No. 05-352
Title: United States, Petitioner
v.
Cuauhtemoc Gonzalez-Lopez
Docketed: September 16, 2005
Lower Ct: United States Court of Appeals for the Eighth Circuit
Case Nos.: (03-3487)
Decision Date: March 8, 2005
Rehearing Denied: May 19, 2005

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Jul 29 2005	Application (05A112) to extend the time to file a petition for a writ of certiorari from August 17, 2005 to September 16, 2005, submitted to Justice Thomas.
Aug 2 2005	Application (05A112) granted by Justice Thomas extending the time to file until September 16, 2005.
Sep 16 2005	Petition for a writ of certiorari filed. (Response due October 17, 2005)
Oct 11 2005	Order extending time to file response to petition to and including November 16, 2005.
Nov 16 2005	Order further extending time to file response to petition to and including November 18, 2005.
Nov 18 2005	Brief of respondent Cuauhtemoc Gonzalez-Lopez in opposition filed.
Nov 30 2005	DISTRIBUTED for Conference of January 6, 2006.
Dec 5 2005	Reply of petitioner United States filed. (Distributed)
Jan 6 2006	Petition GRANTED.
Feb 21 2006	Brief of petitioner United States filed.
Feb 21 2006	The Clerk has approved use of the deferred joint appendix method.
Mar 6 2006	SET FOR ARGUMENT on Tuesday, April 18, 2006.
Mar 20 2006	Joint appendix filed.
Mar 23 2006	CIRCULATED.
Mar 27 2006	Record received from U.S.C.A. 8th Circuit. (1 envelope)
Mar 28 2006	Brief of respondent Cuauhtemoc Gonzalez-Lopez filed. (Distributed)
Mar 28 2006	Brief amicus curiae of National Association of Criminal Defense Lawyers filed. (Distributed)
Apr 5 2006	Record received from U.S.D.C. Eastern Dist. of Missouri. (1 boxes)
Apr 11 2006	Reply of petitioner United States filed. (Distributed).
Apr 18 2006	Argued. For petitioner: Michael R. Dreeben, Deputy Solicitor General, Department of Justice, Washington, D.C. For respondent: Jeffrey L. Fisher,

Seattle, Wash.

Supreme Court, U.S.
FILED
05-352 SEP 16 2005

No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

CUAUHTEMOC GONZALEZ-LOPEZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a district court's denial of a criminal defendant's qualified right to be represented by counsel of choice requires automatic reversal of his conviction.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional provision involved	2
Statement	2
Reasons for granting the petition	8
Conclusion	20
Appendix A	1a
Appendix B	21a

TABLE OF AUTHORITIES

Cases:

Arizona v. *Fulminante*, 499 U.S. 279 (1991)	7
Bland v. *California*, 20 F.3d 1469 (9th Cir.), cert. denied, 513 U.S. 947 (1994)	17
Cuyler v. *Sullivan*, 446 U.S. 335 (1980)	11, 12
Faretta v. *United States*, 422 U.S. 806 (1975)	13
Flanagan v. *United States*, 465 U.S. 259 (1984)	7, 13, 17
Gideon v. *Wainwright*, 372 U.S. 335 (1963)	12, 19
Holloway v. *Arkansas*, 435 U.S. 475 (1978)	12
Johnson v. *United States*, 520 U.S. 461 (1997)	18
McKaskle v. *Wiggins*, 465 U.S. 168 (1984)	13, 14, 19
Mickens v. *Taylor*, 535 U.S. 162 (2002)	9, 10, 11, 12, 14, 15, 17
Morris v. *Slappy*, 461 U.S. 1 (1983)	10
Neder v. *United States*, 527 U.S. 1 (1999)	6, 11, 17, 18, 19
Richardson-Merell, Inc. v. *Koller*, 472 U.S. 424 (1985)	13, 17
Rodriguez v. *Chandler*, 382 F.3d 670 (7th Cir. 2004), cert. denied, 125 S. Ct. 1303 (2005)	7, 8, 16, 17, 18
Rushen v. *Spain*, 464 U.S. 114 (1983)	19
Schell v. *Witak*, 218 F.3d 1017 (9th Cir. 2000)	17
Strickland v. *Washington*, 466 U.S. 668 (1987)	8, 9, 10, 11, 15
Sullivan v. *Louisiana*, 508 U.S. 275 (1993)	19

Cases—Continued: Page

Tumey v. *Ohio*, 273 U.S. 510 (1927) 19
United States v. *Cronic*, 466 U.S. 648 (1984) 8, 9, 10, 11, 12
United States v. *Morrison*, 449 U.S. 361 (1981) 16
United States v. *Panzardi Alvarez*, 816 F.2d 813 (1st Cir. 1987) 16
United States v. *Patterson*, 215 F.3d 776 (7th Cir.), vacated in part, 531 U.S. 1033 (2000) 18
United States v. *Voight*, 89 F.3d 1050 (3d Cir.), cert. denied, 519 U.S. 1047 (1996) 17
United States v. *Walters*, 309 F.3d 589 (9th Cir. 2002), cert. denied, 540 U.S. 846 (2003) 17
Vasquez v. *Hillery*, 474 U.S. 254 (1986) 19
Waller v. *Georgia*, 467 U.S. 39 (1984) 19
Wheat v. *United States*, 486 U.S. 153 (1988) 9, 10, 14, 15
Wilson v. *Mintzes*, 761 F.2d 275 (6th Cir. 1985) 17
Young v. *City of Providence ex rel. Napolitano*, 404 F.3d 4 (1st Cir. 2005) 17

Constitution, statutes and rule:

U.S. Const. Amend. VI ..... *passim*
21 U.S.C. 841(a)(1) 2
21 U.S.C. 846 2
Mo. R. Prof'l Conduct 4.4-2 ..... 5, 6

In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-20a) is reported at 399 F.3d 924. The opinion of the court of appeals in a related case, reversing the district court's imposition of sanctions against respondent's counsel of choice, is reported at 403 F.3d 558.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 2005. Petitions for rehearing were denied on May 19, 2005. App., *infra*, 21a. On August 2, 2005, Justice Thomas extended the time within which to file a

petition for a writ of certiorari to and including September 16, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT

Following a jury trial, respondent was convicted in the United States District Court for the Eastern District of Missouri on one count of conspiring to distribute more than 100 kilograms of marijuana, in violation of 21 U.S.C. 841(a)(1) and 846. He was sentenced to 292 months of imprisonment. The court of appeals reversed, holding that the district court erred in denying the applications for admission *pro hac vice* of respondent's chosen attorney, thereby denying respondent his Sixth Amendment right to be represented by counsel of choice. The court of appeals further held that the district court's error was a structural defect that required automatic reversal of respondent's conviction. App., *infra*, 1a-20a.

1. On January 7, 2003, a grand jury sitting in the Eastern District of Missouri charged petitioner with

conspiring to distribute more than 100 kilograms of marijuana. Respondent's family hired Texas attorney John Fahle to represent respondent. Fahle thereafter appeared on respondent's behalf at the arraignment and detention hearing. App., *infra*, 2a.

Shortly after he was arraigned, respondent called California attorney Joseph Low to discuss the possibility of Low's either assisting Fahle or replacing him. Respondent had learned of Low's reputation as a trial attorney from the defendants in another drug conspiracy case in the same district. After meeting with Low at the jail in Farmington, Missouri, respondent retained him. App., *infra*, 2a.

On March 4, 2003, both Fahle and Low attended an evidentiary hearing on behalf of respondent. Although Low had not yet entered an appearance, the Magistrate Judge accepted Low's provisional entry on the understanding that Low would file a motion for admission *pro hac vice*. The Magistrate Judge subsequently rescinded Low's provisional entry when Low violated the court's rule restricting cross-examination of a witness to one lawyer. App., *infra*, 2a-3a.

One week later, respondent informed Fahle that he wanted Low to be his sole attorney. On March 17, 2003, Low filed an application for admission *pro hac vice*. The district court denied it the following day. Low filed a second *pro hac vice* application on April 14, 2003, which was also denied. Low then filed an application for a writ of mandamus in the court of appeals, seeking to compel the district court to admit Low. The court of appeals dismissed Low's application. App., *infra*, 3a.

On April 25, 2003, Fahle moved to withdraw as counsel for respondent and to continue respondent's trial. The district court granted both motions and ordered

respondent to retain new counsel by May 5, 2003.[1] On advice from Low, respondent retained local attorney Karl Dickhaus. Subsequently, the district court issued an order explaining why it had denied Low's motions for admission *pro hac vice*. App., *infra*, 3a-4a. The court indicated that in another case before it, Low had "contacted a criminal defendant with pre-existing legal representation, interfered with the criminal defendant's representation, and attempted to circumvent the Court's ruling on a continuance of the trial setting." *Id.* at 4a (quoting district court's June 3, 2003 order).

On July 7, 2003, respondent's trial commenced. That day the district court denied Low's third motion for admission *pro hac vice* and Dickhaus's request that Low be permitted to sit at counsel table. Instead, the district court limited Low to the public section of the courtroom and forbade contact between Low and Dickhaus during trial proceedings. Respondent himself was unable to meet with Low until the district court, upon learning that Low had been prevented from visiting respondent at the jail, ordered that jail visits by Low be permitted. On July 11, 2003, the jury found respondent guilty on the sole conspiracy count. App., *infra*, 5a.

2. The court of appeals reversed based on respondent's inability to have Low represent him at trial. App., *infra*, 1a-20a. The court addressed "only the primary argument raised by [respondent] challenging the

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[1] Fahle also moved for sanctions against Low, contending that Low had violated Missouri's rules of professional conduct by communicating with respondent without Fahle's permission. App., *infra*, 3a-4a. The district court granted Fahle's motion for sanctions on August 23, 2003, more than a month after respondent was convicted of the drug trafficking charge. *Id.* at 5a. The court of appeals reversed. See *United States* v. *Gonzalez-Lopez*, 403 F.3d 558 (8th Cir. 2005) (appeal of Joseph Low).

district court's denial of admission pro hac vice to the attorney he selected to represent him in the criminal proceeding." *Id.* at 6a. The court initially observed that "[a] non-indigent criminal defendant's Sixth Amendment rights encompass the right to be represented by the attorney selected by the defendant." *Ibid.* At the same time, the court of appeals explained that the right to counsel of choice "is not absolute," *id.* at 7a, but rather must be "carefully balance[d] * * * against the court's interest in the orderly administration of justice," *ibid.* (internal quotation marks omitted).

The court of appeals found it "clear from the record in this case [that] the district court denied [Low's] application for pro hac vice admission because the court believed Low violated [Missouri Rule of Professional Conduct] 4.4-2 when Low communicated with the represented defendants in [*United States* v. *Serrano et al.*, No. 4:01CR450-JCH (E.D. Mo.)] without obtaining permission from the attorneys who represented them at the time." App., *infra*, 11a. As it explained in its companion decision, see *United States* v. *Gonzalez-Lopez*, 403 F.3d 558 (8th Cir. 2005) (appeal of Joseph Low), the court of appeals believed that the district court's interpretation of that Missouri Rule of Professional Conduct was "not correct," because the rule forbade contact only when the attorney was representing another party in the matter. App., *infra*, 11a.[2] In particular, the court of

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[2] The court of appeals noted that "[t]here is no suggestion in the [district court's] order that Low was representing any other party in the case when he communicated with the [*Serrano*] defendants." App., *infra*, 10a. In fact, during the time at issue, Low did represent one of the defendants in the *Serrano* case. See Gov't Pet. for Panel Reh'g 3. The government nevertheless does not challenge in this Court the court of appeals' ruling that the district court's refusal to admit Low *pro hac vice* was unjustified.

appeals reasoned, "the district court's interpretation of Rule 4-4.2 would unjustifiably prevent parties in a litigation from consulting with other attorneys to obtain alternative advice, hire additional counsel, or hire different counsel." *Id.* at 12a.

The court of appeals acknowledged that "an attorney's past ethical violations may affect the administration of justice within the court and therefore outweigh the Sixth Amendment presumption in favor of the defendant's counsel of choice." App., *infra*, 13a. But the court found it "clear from the record [that respondent's] Sixth Amendment right played no part in the district court's decision to deny Low pro hac vice admission." *Ibid.* The court therefore concluded that "the district court erred in denying Low's application for admission pro hac vice." *Ibid.*

Next, the court of appeals held that the error "results in automatic reversal of the conviction." App., *infra*, 16a. The court acknowledged that "most constitutional errors in criminal trials do not require automatic reversal of the conviction," *id.* at 13a (citing *Neder* v. *United States*, 527 U.S. 1, 7-8 (1999)), and that *Neder* defined the category of structural errors narrowly to include only "a limited class of fundamental constitutional errors" that "are so intrinsically harmful as to require automatic reversal * * * without regard to their effect on the outcome," *id.* at 14a (quoting *Neder*, 527 U.S. at 7). The court of appeals further observed that this Court "has not decided whether harmless error review applies to the denial of the Sixth Amendment right to be represented by the attorney chosen by the defendant." *Id.* at 15a. The court nevertheless sided with "the majority of circuit courts" (*id.* at 16a) that held, before *Neder*, that "a criminal defendant who is denied the Sixth Amendment right to be represented

by his chosen attorney does not have to demonstrate prejudice to obtain reversal of the conviction." *Id.* at 15a-16a (citing cases).[3]

The court of appeals reasoned that "the denial of the right to counsel of choice clearly belongs in the class of fundamental constitutional errors which reflect a defect in the framework of the trial mechanism and 'defy analysis by harmless error standards.'" App., *infra*, 17a (quoting *Arizona* v. *Fulminante*, 499 U.S. 279, 309 (1991)). The court first explained that, unlike "trial error[s]" that are properly subject to harmless-error review, *id.* at 16a, the denial of counsel of choice, "[l]ike the denial of the right to self-representation and the denial of the right to counsel, * * * infects the entire trial process," *id.* at 18a (internal quotation marks omitted), such that it cannot be "quantitatively assessed in the context of other evidence presented," *id.* at 16a. The court carried the analogy to the right to self-representation one step further, explaining that the denial of either right can "never be harmless," because both rights "reflect[] constitutional protection of the defendant's free choice independent of concern for the objective fairness of the proceeding." *Id.* at 18a-19a (quoting *Flanagan* v. *United States*, 465 U.S. 259, 268 (1984)).

Finally, the court of appeals concluded that "[r]equiring a criminal defendant to demonstrate prejudice from the denial of the right to be represented by his chosen counsel would essentially require the defendant

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[3] The court of appeals acknowledged that the Seventh Circuit rejected an automatic reversal rule. See App., *infra*, 16a (citing *Rodriguez* v. *Chandler*, 382 F.3d 670, 675 (7th Cir. 2004), cert. denied, 125 S. Ct. 1303 (2005), and noting parenthetically that *Chandler* "adopt[ed] a middle-ground 'adverse effect' standard").

to demonstrate [that] the attorney who represented him at trial rendered deficient assistance." App., *infra*, 19a-20a. That, the court added, "would effectively obliterate the criminal defendant's Sixth Amendment right to be represented by counsel of his choice, * * * by collapsing th[at] right * * * into the right to receive effective assistance of counsel at trial." *Id.* at 20a. Accordingly, the court of appeals vacated respondent's conviction and remanded for a new trial. *Ibid.*

REASONS FOR GRANTING THE PETITION

The Eighth Circuit has held that the denial of a criminal defendant's right to counsel of choice constitutes a fundamental Sixth Amendment violation warranting automatic reversal of a conviction. That ruling conflicts with this Court's right-to-counsel decisions which hold generally that a criminal defendant cannot obtain reversal of his conviction unless he establishes that an alleged error implicating his Sixth Amendment right to counsel compromised his right to a fair trial. See *Strickland* v. *Washington*, 466 U.S. 668 (1984); *United States* v. *Cronic*, 466 U.S. 648 (1984). The court of appeals' decision also conflicts with the Seventh Circuit's decision in *Rodriguez* v. *Chandler*, 382 F.3d 670 (2004), cert. denied, 125 S. Ct. 1303 (2005), which rejected a rule of automatic reversal for denial of the right to counsel of choice. The court's decision, if allowed to stand, will impair the effective administration of justice, because a rule requiring a retrial when the defendant received both the appearance and the reality of a fair trial imposes unnecessary burdens on both the government and the courts and creates an unjustified risk that guilty defendants will escape punishment. This Court should therefore grant certiorari to review the Eighth Circuit's decision.

1. The court of appeals' holding that the right to counsel of choice is so fundamental that its denial triggers automatic reversal cannot be reconciled with this Court's approach to alleged Sixth Amendment violations generally or with the secondary Sixth Amendment status this Court has accorded the defendant's qualified right to choose his counsel.

a. This Court's right-to-counsel cases make clear that a criminal defendant alleging a Sixth Amendment violation generally must establish that the alleged error deprived him of a fair trial. In *Strickland*, this Court held that a criminal defendant alleging that his counsel provided ineffective assistance must establish not only that "counsel's performance was deficient," but also that counsel's "deficient performance prejudiced the defense." 466 U.S. at 687. The Court explained that "[u]nless a defendant makes both showings, it cannot be said that the conviction * * * resulted from a breakdown in the adversary process that renders the result unreliable." *Ibid.*

Strickland's requirement that a defendant demonstrate prejudice to establish a Sixth Amendment violation implemented the basic principle that "[a]bsent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated." *Cronic*, 466 U.S. at 658. That rule reflects the fact that "the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *Ibid.*; see *Mickens* v. *Taylor*, 535 U.S. 162, 166 (2002); *Wheat* v. *United States*, 486 U.S. 153, 159 (1988).

b. The court of appeals rejected this Court's general rule in this case, concluding that "the denial of the right to counsel of choice clearly belongs in the class of fun-

damental constitutional errors" requiring automatic reversal of a conviction. App., *infra*, 17a. That holding reflects a misunderstanding of the nature of a criminal defendant's right to counsel of choice. As this Court explained in *Wheat*, "while the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." 486 U.S. at 159. For that reason, "in evaluating Sixth Amendment claims, 'the appropriate inquiry focuses on the adversarial process, not on the accused's relationship with his lawyer as such.'" *Ibid.* (quoting *Cronic*, 466 U.S. at 657 n.21); see *Morris* v. *Slappy*, 461 U.S. 1, 14 (1983) ("[W]e reject the claim that the Sixth Amendment guarantees a 'meaningful relationship' between an accused and his counsel.").

This Court has thus made clear that the right to counsel of choice lies at the periphery of the Sixth Amendment, not at its core. The right is qualified in several significant respects. As this Court explained in *Wheat*, the right can be trumped by concerns about, *inter alia*, the fairness of the trial and the administration of justice. 486 U.S. at 159-164. Indeed, a criminal defendant who desires representation has no right to choose an advocate who is not a lawyer, who is disqualified from practice in the relevant jurisdiction, whom "he cannot afford," or who has "an actual conflict" of interest or "a serious potential for [one]." *Id.* at 159, 164.

If a defendant who has demonstrated his counsel's objectively deficient performance must also establish that the deficiences had a "probable effect upon the trial's outcome," *Mickens*, 535 U.S. at 166; see *Strickland*, 466 U.S. at 693-694, then it makes no sense that,

as the court of appeals held, a defendant who receives objectively competent advice is entitled to a new trial without any showing of prejudice just by virtue of a denial of the subsidiary right to counsel of choice.

c. The court of appeals offered three justifications for its decision, none of which withstands scrutiny. First, the court held that the district court's error was structural because it did not "take[] place during the presentation of evidence to the jury," App., *infra*, 16a (internal quotation marks omitted) (citing *Neder* v. *United States*, 527 U.S. 1 (1999)), but rather "infect[ed] the entire trial process from beginning to end," *id.* at 18a (internal quotation marks omitted). It is undoubtedly true that the deprivation of counsel of choice cannot be temporally confined to a particular moment during the trial, but the same is true of other, more fundamental Sixth Amendment claims to which the rule of automatic reversal does not apply. As discussed above, in *Strickland*, 466 U.S. at 693-694, this Court held that a defendant whose counsel performs deficiently—a problem that may pervade the entire trial—must establish that such performance prejudiced him.[4] Similarly, in *Mickens*, 535 U.S. at 172-175, this Court held that a defendant alleging that his counsel labored

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[4] In extreme cases of ineffective assistance, where counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing," *Cronic*, 466 U.S. at 659, the Court applies a rule of automatic reversal. The Court does so because that kind of ineffective assistance "makes the adversary process itself presumptively unreliable." *Ibid.* The same cannot be said about the denial of counsel of choice, which could result in the defendant's receiving even *more* effective representation. See *Mickens*, 535 U.S. at 169 n.2 (characterizing the decision "to retain a particular lawyer" as "often uninformed") (quoting *Cuyler* v. *Sullivan*, 446 U.S. 335, 344 (1980)).

under a conflict of interest relating to a former client must show at the very least that the conflict adversely affected counsel's performance. That conflict is not temporally isolated but pervades the trial. See *Cuyler* v. *Sullivan*, 446 U.S. 335, 350 (1980) (defendant alleging that counsel who represented him and other co-defendants at separate trials and who did not object to the multiple representation must establish that the conflict had an adverse effect on counsel's performance). Thus, the mere fact that the denial of counsel of choice spanned the entire trial is an insufficient basis for applying automatic reversal.

This Court has applied a rule of automatic reversal to Sixth Amendment claims only in exceptional circumstances, such as "where assistance of counsel has been denied entirely or during a critical stage of the proceeding." *Mickens*, 535 U.S. at 166; see *Cronic*, 466 U.S. at 658-660; *Gideon* v. *Wainwright*, 372 U.S. 335, 344-345 (1963). "When that has occurred," however, "the likelihood that the verdict is unreliable is so high that a case-by-case inquiry is unnecessary." *Mickens*, 535 U.S. at 166. See also *Holloway* v. *Arkansas*, 435 U.S. 475 (1978) (automatic reversal when counsel is forced to engage in joint representation of co-defendants over counsel's objection, unless the court determines that there is no conflict). That exception is inapplicable here, where there is *no* inherent likelihood that the verdict was rendered unreliable by the mere fact that respondent was represented by counsel who was not his first choice. Respondent has not argued that his counsel rendered ineffective assistance at trial, and had respondent lacked the resources to retain his chosen counsel, or if his desired counsel had a conflict, he would have had no complaint to make about his trial's fairness at all.

Second, the court of appeals reasoned that the right to counsel of choice is akin to the right to self-representation, the wrongful denial of which is subject to automatic reversal. See *McKaskle* v. *Wiggins*, 465 U.S. 168, 177 n.8 (1984). The court explained that "[b]oth rights 'reflect[] constitutional protection of the defendant's free choice independent of concern for the objective fairness of the proceeding.'" App., *infra*, 18a-19a (quoting *Flanagan* v. *United States*, 465 U.S. 259, 268 (1984)). That analogy is flawed.[5]

The Sixth Amendment "grants to the accused personally the right to make his defense," *Faretta* v. *California*, 422 U.S. 806, 819 (1975), in order to "affirm the dignity and autonomy of the accused," *McKaskle*, 465 U.S. at 176-177. It follows that the violation of the right to self-representation is subject to automatic reversal, because the harm to personal autonomy that denial of the right accomplishes cannot be cured by a reliable jury verdict.

Unlike the right to self-representation—which necessarily reflects the primacy of autonomy over fairness,

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[5] The court of appeals' apparent reliance on *Flanagan* is also flawed. *Flanagan* did not state that the rights to self-representation and to counsel of choice are analogous. The quoted language came from a portion of the Court's opinion in which it *assumed* the two rights were analogous for the purpose of *rejecting* the petitioners' argument that interlocutory review of their pretrial challenge to the disqualification of their chosen counsel was available. See 465 U.S. at 267-269. The Court left open the question whether a defendant complaining about the disqualification of chosen counsel must demonstrate prejudice in order to establish a Sixth Amendment violation. *Ibid.* See *Richardson-Merell, Inc.* v. *Koller*, 472 U.S. 424, 438 (1985) (observing that the Court has not decided whether "prejudice is a prerequisite to reversal of a judgment following erroneous disqualification of counsel in either criminal or civil cases").

see *McKaskle*, 465 U.S. at 177 n.8 (exercise of the right to self-representation "usually increases the likelihood of a trial outcome unfavorable to the defendant")—the right to counsel of choice does not stand above procedural fairness concerns. This Court has emphasized that very distinction, pointing out that "[o]ur holding in *Faretta* * * *, that a criminal defendant has a Sixth Amendment right to represent *himself* if he voluntarily elects to do so, does not encompass the right to choose any advocate if the defendant wishes to be represented by counsel." *Wheat*, 486 U.S. at 159 n.3. To the contrary, concerns about procedural fairness and the effective administration of justice restrict a non-indigent defendant's choice of counsel in significant respects. See p. 10, *supra*. The court of appeals therefore erred in equating the right to counsel of choice with the right to self-representation.

Finally, the court of appeals reasoned that applying a rule of automatic reversal is necessary to prevent "collapsing the right to counsel of choice into the right to receive effective assistance of counsel," and thereby "obliterat[ing] the criminal defendant's Sixth Amendment right to be represented by counsel of his choice, a right the Supreme Court recognized in *Wheat*." App., *infra*, 20a. That is incorrect. Even if a defendant could not obtain relief on appeal without establishing that substitute counsel was ineffective, the right to counsel of choice would not be "obliterated." Trial courts would still be under a Sixth Amendment obligation to apply a "presumption in favor of [a defendant's] counsel of choice," *Wheat*, 486 U.S. at 164, and those courts could be expected to carry out that responsibility conscientiously and in good faith, cf. *Mickens*, 535 U.S. at 173 (rejecting automatic reversal as a sanction "to induce * * * trial judges to follow the law" on conflicts

of interest). In those few instances in which the right to counsel of choice is improperly denied, with the result that the defendant proceeded to trial with his second-choice counsel, requiring proof of *that* counsel's ineffectiveness would be consistent with this Court's recognition that the Sixth Amendment right to the assistance of counsel "has been accorded[] * * * not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *Id.* at 166 (internal quotation marks omitted).

But even if *Wheat* is read as suggesting that protection of the right to counsel of choice demands a different showing of deficiency than required in a typical ineffectiveness case, the court of appeals was still incorrect in dispensing with *any* showing of prejudice. A court could apply a rule that vindicates the defendant's interest in retaining counsel of choice without losing sight of the ultimate concerns about the fairness of the trial and the administration of justice that traditionally apply in determining whether an alleged Sixth Amendment violation warrants a new trial.

That rule would have relieved respondent of the burden to show that his substitute counsel rendered deficient performance under the first prong of the *Strickland* test, but would have required respondent to show that his counsel of choice would have pursued a different defense strategy, one that would have created a "reasonable probability that * * * the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Such a modified *Strickland* standard would not burden the defendant with establishing that his second-choice counsel was incompetent, yet would require a retrial only when the denial of the defendant's counsel of choice might well have made a difference to the outcome. Such an inquiry would have to be carried

out with due regard for the often speculative nature of determinations about how counsel of choice would have in fact conducted the defense. But it would avoid the unwarranted retrials required by the court of appeals' rule of automatic reversal (*e.g.*, automatically mandating a retrial on guilt if the defendant were denied a lawyer chosen for his sentencing expertise) and thus would, unlike the court of appeals' rule, respect this Court's "general rule that remedies should be tailored to the injury suffered * * * and should not unnecessarily infringe on competing interests." *United States* v. *Morrison*, 449 U.S. 361, 364 (1981).

2. The court of appeals' decision conflicts with the Seventh Circuit's decision in *Rodriguez* v. *Chandler*, 382 F.3d 670 (2004), cert. denied, 125 S. Ct. 1303 (2005). There, the Seventh Circuit held that a prisoner collaterally attacking his conviction on the ground that the trial court erroneously disqualified one of his chosen attorneys is not entitled to automatic reversal of his conviction. *Id.* at 675. The court explained that "[a] rule of automatic reversal when the defendant does not get his first-choice lawyer, but requiring proof of prejudice when the defendant does not get even a competent lawyer, would not make sense," *id.* at 674, because "[a] defendant with an inept attorney is in a more precarious position than one with a competent lawyer who is the defendant's second or third choice," *ibid.*[6]

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[6] The court recognized that "several circuits have held that the denial of the right to choice of counsel never may be deemed harmless." 382 F.3d at 674-675 (citing *United States* v. *Panzardi Alvarez*, 816 F.2d 813 (1st Cir. 1987); *United States* v. *Voight*, 89 F.3d 1050 (3d Cir.), cert. denied, 519 U.S. 1047 (1996); *Wilson* v. *Mintzes*, 761 F.2d 275 (6th Cir. 1985); *Bland* v. *California*, 20 F.3d 1469 (9th Cir.), cert. denied, 513 U.S. 947 (1994), overruled on other grounds by *Schell* v. *Witek*, 218 F.3d 1017 (9th Cir. 2000)). The

Instead, the Seventh Circuit adopted an "adverse-effect standard" requiring the defendant to show "an identifiable difference in the quality of representation between the disqualified counsel and the attorney who represents the defendant at trial," but not a difference so great as "to undermine confidence in the outcome." *Chandler*, 382 F.3d at 675 (characterizing the adverse-effect standard as "midway between automatic reversal and requiring proof of a likely difference in the litigation's outcome"). Recognizing that this Court has left open the question of whether a defendant claiming the denial of the right to counsel of choice must establish prejudice, *id.* at 673-674 (citing *Flanagan*, 465 U.S. at 268-269, and *Richardson-Merrell, Inc.* v. *Koller*, 472 U.S. 424, 438 (1985)), the court concluded that the "adverse-effect" standard "seems the closest match to situations in which the court wrongly strips the defendant of his preferred lawyer," *id.* at 675.[7]

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court pointed out (382 F.3d at 675), however, that all of those decisions preceded this Court's decisions in *Neder*, *supra*, and *Mickens*, *supra*, both of which emphasized that claims subject to the rule of automatic reversal are the rare exception. See *Neder*, 527 U.S. at 8-9; *Mickens*, 535 U.S. at 166. The First Circuit has acknowledged that it adopted its rule of automatic reversal before *Neder*, and that since that decision, courts have reached "somewhat varying results." *Young* v. *City of Providence ex rel. Napolitano*, 404 F.3d 4, 24 n.14 (2005). See also *United States* v. *Walters*, 309 F.3d 589, 592-593 (9th Cir. 2002) (rejecting rule of automatic reversal for denial of right to counsel of choice at sentencing), cert. denied, 540 U.S. 846 (2003).

[7] Athough *Chandler* addressed the Sixth Amendment claim on collateral review, the court's rejection of automatic reversal was not limited to the specific context or facts of the case. The court rejected the rationale for applying automatic reversal to an error implicating the right to counsel of choice irrespective of the procedural posture in which the claim is raised. See 382 F.3d at 674 ("It

3. This Court should grant certiorari to decide the question left open in *Flanagan*. The court of appeals' decision not only conflicts with this Court's long-standing approach to alleged Sixth Amendment violations and with the decision of another federal court of appeals, but it also compromises the effective administration of justice. Recent decisions of this Court have emphasized that rules of automatic reversal are highly disfavored and should be reserved for only the most egregious constitutional errors that fundamentally undermine the defendant's right to a fair trial.

For example, in *Neder*, this Court explained that the rule of automatic reversal applies "only in a very limited class of cases," namely, those in which the defect asserted "deprive[s] [the] defendant[] of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence." 527 U.S. at 8-9. See *Johnson* v. *United States*, 520 U.S. 461, 468-469 (1997). This Court in

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is hard to see why violations of the qualified right to counsel of choice should lead to automatic reversal, when deprivation of the absolute right to a competent attorney leads to relief only if prejudice is demonstrable."). Indeed, the court placed reliance on cases decided on direct review, see *ibid.* (citing *United States* v. *Patterson*, 215 F.3d 776, 778-782 (7th Cir.), vacated in part on other grounds, 531 U.S. 1033 (2000), for the point that "the difficulty of showing prejudice from an error * * * does not justify automatic reversal"), and distinguished other circuit decisions applying automatic reversal on direct review not on the ground that those decisions arose on direct review, but on the ground that they preceded *Neder* and *Mickens*, see 382 F.3d at 674-675. Nor does the fact that the defendant in *Chandler* had two lawyers, only one of whom was disqualified, negate the conflict with the decision below. The court categorically rejected automatic reversal, see *id.* at 675, and merely noted that automatic reversal was "particularly" inappropriate on the facts of the case. *Id.* at 674.

Johnson and *Neder* identified only a handful of defects that rise to the level of structural error warranting automatic reversal—namely, a total deprivation of the right to counsel (*Gideon*, *supra*); a biased trial judge (*Tumey* v. *Ohio*, 273 U.S. 510 (1927)); the race-based exclusion of grand jurors (*Vasquez* v. *Hillery*, 474 U.S. 254 (1986)); the right to self-representation at trial (*McKaskle*, *supra*); the right to a public trial (*Waller* v. *Georgia*, 467 U.S. 39 (1984)); and the right to a correct reasonable doubt instruction (*Sullivan* v. *Louisiana*, 508 U.S. 275 (1993)). *Neder*, 527 U.S. at 8; *Johnson*, 520 U.S. at 469.

Proceeding to trial without counsel of choice, but with counsel recommended by counsel of choice, as respondent did here, cannot be said to have led to a trial that could not "reliably serve its function as a vehicle for determination of guilt." *Neder*, 527 U.S. at 9. It certainly does not rise to the level of the few intrinsically harmful errors that this Court has singled out for automatic reversal. Confining the rule of automatic reversal to those narrowly defined circumstances is necessary to "preserv[e] society's interest in the administration of criminal justice." *Rushen* v. *Spain*, 464 U.S. 114, 118 (1983) (per curiam). Because the court of appeals did not so confine the rule here, the decision merits this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2005

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 03-3487

UNITED STATES OF AMERICA, PLAINTIFF/APPELLEE

v.

CUAUHTEMOC GONZALEZ-LOPEZ,
ALSO KNOWN AS TOMAS, DEFENDANT/APPELLANT

Submitted: Sept. 16, 2004
Filed: Mar. 8, 2005
Rehearing and Rehearing En Banc
Denied: May 19, 2005

OPINION

Before WOLLMAN, RICHARD S. ARNOLD,[1] and BYE, Circuit Judges.

BYE, Circuit Judge.

Cuauhtemoc Gonzalez-Lopez was convicted by a jury of conspiring to distribute more than 100 kilograms of marijuana, in violation of 21 U.S.C. §§ 841(a)(1), 846. On appeal, he argues his conviction should be vacated because the district court violated his Sixth Amendment right to be represented by the counsel of his

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[1] The Honorable Richard S. Arnold died on September 23, 2004. The case has been decided by the remaining members of the panel pursuant to 28 U.S.C. § 46(d) and 8th Cir. R. 47E.

choice at trial by refusing to grant his attorney's applications for admission pro hac vice. Finding a Sixth Amendment violation, we vacate the conviction and remand the case for a new trial.

I

We begin our discussion with a presentation of the background facts.[2] On January 7, 2003, Gonzalez-Lopez was charged with conspiring to distribute more than 100 kilograms of marijuana in the Eastern District of Missouri. Immediately after the arrest, some of his family members hired Texas attorney John Fahle to represent him on the criminal charges. On January 8, 2003, Fahle appeared at the defendant's detention hearing and arraignment. Shortly after the arraignment, Gonzalez-Lopez telephoned California attorney Joseph Low to discuss the possibility of Low either assisting Fahle or assuming the representation. Apparently he had learned of Low's trial prowess from the defendants in an earlier unrelated drug conspiracy trial in the Eastern District of Missouri. At Gonzalez-Lopez's request, Low met with him at the jail in Farmington, Missouri, between January 8 and 10, 2003. Within ten days of this meeting, Gonzalez-Lopez hired Low.

On March 4, 2003, Low traveled to Missouri to attend an evidentiary hearing in the case conducted by the magistrate judge. Fahle also attended the evidentiary hearing on behalf of Gonzalez-Lopez. As of March 4, 2003, Low had not entered his appearance in the case.

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[2] The facts and issues in this case are closely related to those in *Joseph Low, IV v. John Fahle*, 2003 WL 23911038, No. 03-3200 (8th Cir. 2005), in which we examine the district court's imposition of sanctions against Joseph Low, Gonzalez-Lopez's attorney of choice.

The magistrate judge initially accepted Low's provisional entry and permitted Low to participate in the hearing based on Low's assurance he would file a motion for admission pro hac vice. However, during the hearing the magistrate judge rescinded the provisional approval after Low violated the court's rule restricting the cross-examination of a witness to one lawyer by passing notes to Fahle.

Gonzalez-Lopez informed Fahle on March 11, 2003, that he wanted Low to be his sole attorney and asked Fahle to stop representing him. On March 17, 2003, Low filed an application for admission pro hac vice to the Eastern District of Missouri. The district court denied Low's application the next day without providing any oral or written explanation. On April 14, 2003, Low filed a second application for admission pro hac vice. The district court denied the application again without explanation. On April 30, 2003, Low filed a writ of mandamus in our court seeking to compel the district court to grant Low's motion for admission pro hac vice. The application for a writ was dismissed. Additionally, Low applied by general application for admission to the Eastern District of Missouri, which was not ruled on until after the conclusion of Gonzalez-Lopez's trial.

On April 25, 2003, Fahle filed motions to continue the trial, withdraw as counsel, and for a show cause hearing for sanctions against Low. In the motion for a show cause hearing, Fahle accused Low of violating the rules of professional conduct, specifically Missouri Rule 4-4.2,[3] by communicating with Gonzalez-Lopez about the

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[3] Rule 4-4.2 states: "In representing a client, a lawyer shall not communicate about the subject of the representation with a party he knows to be represented by another lawyer in the matter,

criminal prosecution without Fahle's permission even though Low knew Fahle represented Gonzalez-Lopez in the matter. At the hearing that day, the court granted Gonzalez-Lopez until May 5, 2003, to retain new counsel and continued the trial setting until July 7, 2003. Gonzalez-Lopez, through Low, retained St. Louis attorney Karl Dickhaus as local counsel for trial. On May 2, 2003, Dickhaus entered his appearance for Gonzalez-Lopez, and the court granted Fahle's motions to continue the trial date and leave to withdraw.

The first time the district court provided Gonzalez-Lopez with an explanation for the denial of Low's applications for admission pro hac vice was on June 3, 2003, in the court's memorandum and order denying Low's motion to strike Fahle's motion for sanctions. In the June 3, 2003, memorandum and order, the district court stated:

> In denying [the motions for admission pro hac vice], the Court considered Mr. Low's conduct before the Court in *United States v. Serrano et al.*, 4:01CR450 JCH. The record in that proceeding indicates that Mr. Low contacted a criminal defendant with pre-existing legal representation, interfered with the criminal defendant's representation, and attempted to circumvent the Court's ruling on a continuance of the trial setting.

In the same order, the district court noted: "Mr. Low has sought admission into this Court by every means available. He has been denied admission *pro hac vice* because of allegations of ethical improprieties-the very

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unless the lawyer has the consent of the other lawyer or is authorized by law to do so." Mo. Rules of Prof'l Conduct R. 4-4.2.

improprieties that are the subject of the motion for sanctions."

On July 7, 2003, the first day of trial, Low again moved for admission and was denied. Dickhaus requested Low be permitted to sit at the table for the defense to assist Dickhaus, who was much less experienced with criminal trials. The district court denied the request, ordered Low to remain in the audience, and forbid Low to have any contact with Dickhaus during the trial proceedings. A United States Marshal sat between Dickhaus and Low during the trial. Gonzalez-Lopez was also unable to meet with Low in the morning before the start of trial, during breaks, during lunch, or after the trial concluded for the day. Low was denied access to the detention facility where Gonzalez-Lopez was housed in the evenings. However, after he complained to the district court about being prohibited from receiving visits from Low in the evenings, the district court ordered the visits to be permitted. He was able to meet with Low on the last night of the trial. The jury found Gonzalez-Lopez guilty of the sole count of the indictment on July 11, 2003.

On August 23, 2003, the district court ruled in favor of Fahle on the motion for sanctions against Low. The court held Low violated Missouri Rule 4-4.2 by communicating with Gonzalez-Lopez about the criminal charges against him without Fahle's permission even though Low knew Fahle represented him. Additionally, in the same memorandum and order, the district court stated it had properly denied Low's motions for admission pro hac vice. The court explained: "These denials were premised on the conduct of Mr. Low that surfaced during the *Serrano* trial, specifically Mr.

Low's meeting with represented codefendants without the prior consent of their attorneys."

II

Gonzalez-Lopez raises several arguments on appeal challenging his conviction and sentence. We address only the primary argument raised by the defendant challenging the district court's denial of admission pro hac vice to the attorney he selected to represent him in the criminal proceeding.

A non-indigent criminal defendant's Sixth Amendment rights encompass the right to be represented by the attorney selected by the defendant. *Wheat v. United States*, 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988); *Powell v. Alabama*, 287 U.S. 45, 53, 53 S. Ct. 55, 77 L. Ed. 158 (1932). As a general rule, "'defendants are free to employ counsel of their own choice and the courts are afforded little leeway in interfering with that choice.'" *United States v. Lewis*, 759 F.2d 1316, 1326 (8th Cir. 1985) (quoting *United States v. Cox*, 580 F.2d 317, 321 (8th Cir. 1978)). "The right to privately retain counsel of choice derives from a defendant's right to determine the type of defense he wishes to present." *United States v. Mendoza-Salgado*, 964 F.2d 993, 1014 (10th Cir. 1992) (citations omitted); *United States v. Laura*, 607 F.2d 52, 56 (3d Cir. 1979) (citations omitted). "Lawyers are not fungible, and often the most important decision a defendant makes in shaping his defense is his selection of an attorney." *Mendoza-Salgado*, 964 F.2d at 1015-16 (internal quotations and citations omitted). Furthermore, "'[a] defendant's right to the counsel of his choice includes the right to have an out-of-state lawyer admitted *pro hac vice*.'" *United States v. Ries*, 100 F.3d 1469, 1471 (9th Cir. 1996) (quoting *United States* v. *Lillie*, 989 F.2d

1054, 1056 (9th Cir. 1993)). Thus, "a decision denying a *pro hac vice* admission necessarily implicates constitutional concerns." *Panzardi-Alvarez v. United States*, 879 F.2d 975, 980 (1st Cir.1989) (citation omitted).

"[W]hile an accused who is financially able to retain counsel of his own choosing must not be deprived of a reasonable opportunity to do so, the right to retain counsel of one's choice is not absolute." *United States v. Vallery*, 108 F.3d 155, 157 (8th Cir. 1997) (citing *Urquhart* v. *Lockhart*, 726 F.2d 1316, 1319 (8th Cir. 1984)). "The right to choice of counsel must not obstruct orderly judicial procedure or deprive courts of their inherent power to control the administration of justice." *Id.* (citing *United States v. Gallop*, 838 F.2d 105, 108 (4th Cir. 1988)). Thus, the district court must carefully balance the defendant's right to be represented by the counsel of his choice against the court's interest in "'the orderly administration of justice.'" *Urquhart*, 726 F.2d at 1319 (quoting *Linton v. Perini*, 656 F.2d 207, 209 (6th Cir. 1981)). This issue typically arises when a criminal defendant seeks to substitute counsel shortly before trial or during the trial. *Panzardi-Alvarez*, 879 F.2d at 980 (citations omitted). "It is also appropriate, however, for the court to consider the effect of the attorney's past actions (especially past ethical violations) on the administration of justice within the court." *Id.*

It is the government's position that we should defer to the district court's decision to deny Low admission pro hac vice because the district court judge in the instant case also presided over the *Serrano* case and was therefore in the better position to observe Low's conduct in that case. We disagree. It is clear from the record the district court's decision to deny Low admission pro hac vice was based on conduct occurring out-

side the presence of the judge, namely Low's communication with represented parties. *See United States v. Collins*, 920 F.2d 619, 628 (10th Cir. 1990) (revocation of attorney's admission pro hac vice reviewed de novo where attorney was disqualified based on pleadings not conduct in open court). Furthermore, the record reflects the district court's decision to deny Low's applications for admission pro hac vice turned on the district court's interpretation of the law. We therefore review the issues in this case de novo. *See Emery v. Hunt*, 272 F.3d 1042, 1046 (8th Cir. 2001) (stating "even under the abuse of discretion standard, a district court's rulings on issues of law are reviewed de novo") (citation omitted); *Lamb Eng'g & Const. Co. v. Neb. Pub. Power Dist.*, 103 F.3d 1422, 1434 (8th Cir. 1997) (citation omitted).

We also reject the government's suggestion that the district court was not required to provide an explanation for denying Low's application for admission pro hac vice. A district court which denies an application for admission pro hac vice submitted by the attorney for a criminal defendant must articulate the reason for the denial "for the benefit of the defendant and the reviewing court." *Ries*, 100 F.3d at 1472; Collins, 920 F.2d at 628 (citing *Laura*, 607 F.2d at 60). The district court denied Low's applications for admission pro hac vice on March 18, 2003, and April 14, 2003, without providing written or oral explanation.[4] However, the district

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[4] Relying on Eleventh Circuit and Fifth Circuit case law, Gonzalez-Lopez argues the district court was required to hold an evidentiary hearing before denying Low admission pro hac vice and the district court should not be able to deny an attorney admission pro hac vice unless the attorney engages in unethical conduct sufficient to warrant disbarment. *See Schlumberger Techs., Inc. v.*

court provided its explanation for denying Low's applications for admission pro hac vice in two subsequent orders relating to the motion for sanctions against Low.

The first time the district court provided an explanation for denying Low's applications was in the court's June 3, 2003, memorandum and order in which the court denied Low's motion to strike Fahle's motion for sanctions against Low. In the background section of the June 3, 2003, order, the court explained it had denied Low's application for admission pro hac vice because of Low's conduct in the *Serrano* case. According to the court, "[t]he record in that proceeding indicates that Mr. Low contacted a criminal defendant with pre-existing legal representation, interfered with the criminal defendant's representation, and attempted to circumvent the Court's ruling on a continuance of the trial setting." The court also noted in the order: "[Mr. Low] has been denied admission *pro hac vice* because of allegations of ethical improprieties-the very improprieties that are the subject of the motion for sanctions." The court provided no further explanation or details.

The district court provided a more detailed explanation for denying Low's applications in the court's August 23, 2003, memorandum and order ruling on the motion for sanctions against Low. The order provided the following description of Low's conduct in the *Serrano* case which the court found to violate Rule 4-4.2:

> The transcript of the January 6, 2003 pre-tr[ia]l motions hearing in *United States v. Serrano et al.* establishes that on January 2, 2003 Mr. Low and Mr.

Wiley, 113 F.3d 1553, 1159 (11th Cir. 1997); *In re Evans*, 524 F.2d 1004, 1007-08 (5th Cir. 1975). The Eighth Circuit has not adopted a similar rule, and we decline to adopt such a rule at this time.

> Alarid met with the criminal Defendants Jose Serrano, Francisco Serrano, Eduardo Serrano, and Raymundo Aguilar Sanchez, as a group in the Francois County jail. At this time Francisco Serrano was represented by Grant Shostak; Eduardo Serrano was represented by Scott Furstman; and Raymundo Aguilar Sanchez was represented by Raymond Bolourtchi. None of these attorneys was present for the meetings between the Defendants and Mr. Low and Mr. Alarid, and Mr. Shostak and Mr. Bolourtchi testified that they did not give these attorneys permission to meet with their clients. Moreover, Mr. Low and Mr. Alarid did not notify Mr. Shostak and Mr. Bolourtchi that they were meeting with their clients.

There is no suggestion in the court's order that Low was representing any other party in the case when he communicated with the defendants on January 2, 2003. The court concluded: "After its experience with Mr. Low in *United States v. Serrano et al.*, specifically with respect to his contact with represented parties, the Court properly exercised its discretion in denying Mr. Low *pro hac vice* status in *United States v. Cuauhtemoc Gonzalez-Lopez*."

Also in the August 23, 2003, memorandum and order, the court held Low violated Missouri Rule 4-4.2 by communicating with Gonzalez-Lopez without Fahle's permission. There is similarly no indication in the court's order that Low was representing any other party in the case when he spoke with Gonzalez-Lopez about the possibility of becoming his lawyer. The district court stated that, in deciding to impose sanctions against Low for communicating with Gonzalez-Lopez, the court considered testimony concerning Low's con-

duct of contacting represented parties in the *Serrano* case, noting the "inextricable nature of the two cases."

It is clear from the record in this case the district court denied Gonzalez-Lopez's attorney's application for pro hac vice admission because the court believed Low violated Rule 4.4-2 when Low communicated with the represented defendants in the *Serrano* case without obtaining permission from the attorneys who represented them at the time. It is also clear from the record the court did not consider or find relevant whether Low was representing any other party in the case when he communicated with the *Serrano* defendants about their case. The district court interprets Rule 4-4.2 to prohibit any attorney from speaking to any party represented by counsel in a matter about that matter without permission from the party's attorney even if the attorney is not representing any other party in the case.

The government argues the district court's interpretation of Missouri Rule 4-4.2 is correct. As we discuss in our opinion in the companion case, *Joseph Low, IV v. John Fahle*, 2003 WL 23911038, No. 03-3200 (8th Cir. 2005), the district court's interpretation of Rule 4-4.2 is not correct. Rule 4-4.2 states: "In representing a client, a lawyer shall not communicate about the subject of the representation with a party he knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." Mo. Rules of Prof'l Conduct R. 4-4.2. Under the district court's interpretation of Rule 4-4.2, an attorney with no involvement in a case is prohibited from speaking to represented parties in a case about the case without the permission of pre-existing counsel. This interpretation effectively reads

the words "In representing a client" out of the Rule. It is also not supported by the purpose of the Rule, which is to protect represented parties from overreaching by the attorneys representing other parties in the matter.

Furthermore, the district court's interpretation of Rule 4-4.2 would unjustifiably prevent parties in a litigation from consulting with other attorneys to obtain alternative advice, hire additional counsel, or hire different counsel. This is particularly problematic in the context of criminal cases in which defendants have a Sixth Amendment right to be represented by the attorney they select. For example, in the present case, immediately after Gonzalez-Lopez was charged with conspiring to distribute marijuana on January 7, 2003, his family retained Fahle to represent him. Fahle appeared on Gonzalez-Lopez's behalf at the hearing and arraignment which was held the very next day. Understandably, after being charged with the criminal complaint on January 7 and prior to the arraignment on January 8, Gonzalez-Lopez may not have had a chance to select an attorney. Soon after the arraignment, he did contact California attorney Joseph Low, whom he had heard favorable things about and whom he was interested in hiring to represent him either in place of Fahle or in addition to Fahle. Prior to receiving Gonzalez-Lopez's call, Low had no involvement in the criminal case. Between January 8 and 10, 2003, they met at Gonzalez-Lopez's request, and within ten days he selected Low to represent him in the criminal proceeding. Under the district court's interpretation of Rule 4-4.2, after January 8, 2003, no other attorney was allowed to speak with Gonzalez-Lopez about the case without Fahle's permission.

We are further troubled by the fact that in the two district court orders discussing the denial of Low's application for admission pro hac vice there is no mention of the effect of the denial on Gonzalez-Lopez's Sixth Amendment right to representation by counsel of his choice. Instead, the court's discussions of its reason for denying Low's applications address the effect of the denial on Low's rights only. In the June 3, 2003, order, when the district court provided its reasons for denying Low's application, the district court noted its "'power to control admission to its bar,'" but did not mention Gonzalez-Lopez's Sixth Amendment right to choice of counsel. In the August 23, 2003, order, the court discussed and rejected Low's argument that due process entitled Low to a hearing before the court denied him pro hac vice admission. While an attorney's past ethical violations may affect the administration of justice within the court and therefore outweigh the Sixth Amendment presumption in favor of the defendant's counsel of choice, it is clear from the record Gonzalez-Lopez's Sixth Amendment right played no part in the district court's decision to deny Low pro hac vice admission.

We conclude the district court erred in denying Low's application for admission pro hac vice.

III

Next, we consider whether the deprivation of the right to counsel of choice is subject to harmless error review. It is well established most constitutional errors in criminal trials do not require automatic reversal of the conviction. *Neder v. United States*, 527 U.S. 1, 7-8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). In *Chapman v. California*, 386 U.S. 18, 22, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), the Supreme Court held "there may be some constitutional errors which in the setting of a particular

case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring automatic reversal of the conviction." In *Arizona v. Fulminante*, 499 U.S. 279, 306-10, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991), the Supreme Court held constitutional errors occurring in a criminal proceeding fall into one of two categories: "trial errors" or errors reflecting "structural defects." "Trial error 'occur[s] during the presentation of the case to the jury,' and is amenable to harmless-error analysis because it 'may . . . be quantitatively assessed in the context of other evidence presented in order to determine [the effect it had on the trial].'" *Brecht v. Abrahamson*, 507 U.S. 619, 629, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993) (quoting *Fulminante*, 499 U.S. at 307-08, 111 S. Ct. 1246). In such cases, the conviction will not be reversed if the government can demonstrate "'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Sullivan v. Louisiana*, 508 U.S. 275, 279, 113 S. Ct. 2078, 124 L. Ed .2d 182 (1993) (quoting *Chapman*, 386 U.S. at 24, 87 S. Ct. 824).

The second category consists of "a limited class of fundamental constitutional errors that 'defy analysis by "harmless error" standards.'" *Neder*, 527 U.S. at 7, 119 S. Ct. 1827 (quoting *Fulminante*, 499 U.S. at 309, 111 S. Ct. 1246). These constitutional errors "are so intrinsically harmful as to require automatic reversal (*i.e.*, 'affect substantial rights') without regard to their effect on the outcome." *Id.* In these cases, the error causes a "'defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.'" *Id.* at 8, 119 S. Ct. 1827 (quoting *Fulminante*, 499 U.S. at 310, 111 S. Ct. 1246). The Supreme

Court has not decided whether harmless error review applies to the denial of the Sixth Amendment right to be represented by the attorney chosen by the defendant. In *Flanagan v. United States*, 465 U.S. 259, 268, 104 S. Ct. 1051, 79 L. Ed. 2d 288 (1984), however, the Court hinted that the denial of the right to counsel of choice may result in automatic reversal by comparing the right to rights which if violated result in automatic reversal.

The Eighth Circuit has never directly decided this issue. In *Lewis*, we considered the issue of "whether a solvent defendant who is denied chosen counsel and who is not impeding the administration of justice, must show prejudice from this denial in order to obtain relief." 759 F.2d at 1326. Noting the Ninth Circuit to be the only court to have addressed the issue at that time, we found "merit" in the Ninth Circuit's view that denial of the right does not require a showing of prejudice for reversal. *Id.* at 1326-27 (citing *United States v. Ray*, 731 F.2d 1361, 1365 (9th Cir. 1984)). We did not decide the issue in *Lewis* because we found the defendant in that case failed to request alternate counsel and was therefore not denied his right to counsel of choice. *Id.* at 1327. Additionally, in *United States v. Villegas*, an unpublished per curiam opinion, we noted in dicta that a violation of the right to choice of counsel does not require a demonstration of prejudice. 8 Fed. Appx. 597, 598 (8th Cir. 2001) (unpublished per curiam) (citing *Lewis*, 759 F.2d at 1326-27).

We recognize that nearly all the circuit courts to address this issue have held a criminal defendant who is denied the Sixth Amendment right to be represented by his chosen attorney does not have to demonstrate prejudice to obtain reversal of the conviction. *See*

United States v. Voigt, 89 F.3d 1050, 1074 (3d Cir. 1996); *United States v. Childress*, 58 F.3d 693, 736 (D.C. Cir. 1995) (per curiam); *Bland v. California*, 20 F.3d 1469, 1478 (9th Cir. 1994), *overruled on other grounds by Schell v. Witek*, 218 F.3d 1017 (9th Cir. 2000); *United States v. Mendoza-Salgado*, 964 F.2d 993, 1015-16 (10th Cir. 1992); *United States v. Panzardi Alvarez*, 816 F.2d 813, 818 (1st Cir. 1987); *Wilson v. Mintzes*, 761 F.2d 275, 285-86 (6th Cir. 1985). *But see Rodriguez v. Chandler*, 382 F.3d 670, 675 (7th Cir.2004) (adopting a middle-ground "adverse effect" standard); *United States v. Walters*, 309 F.3d 589, 593 (9th Cir. 2002) (holding harmless error review applies to denial of counsel of choice at sentencing phase only because denial was not a complete denial of counsel of choice).

We join the majority of circuit courts and hold the denial of a criminal defendant's Sixth Amendment right to be represented by the attorney he selected results in automatic reversal of the conviction.

The denial of the right to counsel of one's choice does not fit in the category of cases reflecting a "trial error" which takes place "during the presentation of evidence to the jury" and can therefore be "quantitatively assessed in the context of other evidence presented." *See, e.g., Neder*, 527 U.S. at 8-9, 119 S. Ct. 1827 (omission of element of offense in jury instruction subject to harmless error review); *Fulminante*, 499 U.S. at 306-07, 111 S. Ct. 1246 (listing, among other examples, the following "trial errors" subject to harmless error review: *Carella v. California*, 491 U.S. 263, 266, 109 S. Ct. 2419, 105 L. Ed. 2d 218 (1989) (erroneous conclusive presumption in jury instruction); *Rose v. Clark*, 478 U.S. 570, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986) (erroneous rebuttable presumption in jury instruction); *Delaware*

v. Van Arsdall, 475 U.S. 673, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986) (improper restriction on defendant's right to cross-examine witness for bias); *United States v. Hasting*, 461 U.S. 499, 103 S. Ct. 1974, 76 L. Ed. 2d 96 (1983) (improper comment at trial about defendant's silence); *Moore v. Illinois*, 434 U.S. 220, 232, 98 S. Ct. 458, 54 L. Ed. 2d 424 (1977) (erroneous admission of identification evidence); *Brown v. United States*, 411 U.S. 223, 231-32, 93 S. Ct. 1565, 36 L. Ed. 2d 208 (1973) (improper admission of non-testifying co-defendant's out-of-court statement)).

Instead, the denial of the right to counsel of choice clearly belongs in the class of fundamental constitutional errors which reflect a defect in the framework of the trial mechanism and "defy analysis by 'harmless error standards.'" *Fulminante*, 499 U.S. at 309, 111 S. Ct. 1246. In *Fulminante*, the Supreme Court described this class of fundamental constitutional errors as follows:

> One of those violations, involved in *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), was the total deprivation of the right to counsel at trial. The other violation, involved in *Tumey v. Ohio*, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749 (1927), was a judge who was not impartial. These are structural defects in the constitution of the trial mechanism, which defy analysis by "harmless-error" standards. The entire conduct of the trial from beginning to end is obviously affected by the absence of counsel for a criminal defendant, just as it is by the presence on the bench of a judge who is not impartial. Since our decision in *Chapman*, other cases have added to the category of constitutional errors which are not subject to harmless error the follow-

> ing: unlawful exclusion of members of the defendant's race from a grand jury, *Vasquez v. Hillery*, 474 U.S. 254, 106 S. Ct. 617, 88 L. Ed. 2d 598 (1986); the right to self-representation at trial, *McKaskle v. Wiggins*, 465 U.S. 168, 177-78 n.8, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984); and the right to public trial, *Waller v. Georgia*, 467 U.S. 39, 49 n.9, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984). Each of these constitutional deprivations is a similar structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.

Fulminante, 499 U.S. at 309-10, 111 S. Ct. 1246; *see also Sullivan*, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (deficient reasonable doubt jury instruction is structural error which defies harmless error review).

Like the denial of the right to self-representation and the denial of the right to counsel, the denial of the right to be represented by one's selected attorney "infects the entire trial process" from "beginning to end." As the Third Circuit recognized in *United States v. Laura:* "Attorneys are not fungible." 607 F.2d at 56. Within the range of effective advocacy, attorneys will differ as to their trial strategy, oratory style, and the importance they place on certain legal issues. *Id.* They may also differ with respect to expertise in certain areas of law, and experience or familiarity with opposing counsel and the judge. These differences will impact a trial in every way the presence or absence of counsel impacts a trial.

Moreover, like the denial of the right to self-representation, the unwarranted denial of the right to choice of counsel can "never be harmless." Both rights "reflect[ ] constitutional protection of the defendant's free choice independent of concern for the objective fairness

of the proceeding." *Flanagan*, 465 U.S. at 268, 104 S. Ct. 1051 (citing *McKaskle*, 465 U.S. at 177 n.8, 104 S. Ct. 944); *see Panzardi Alvarez*, 816 F.2d at 818; *Wilson*, 761 F.2d at 286. The criminal defendant's right to select the attorney of his choice to represent him, like the right to self-representation, derives from the Sixth Amendment principle wherein the defendant has the right to decide the type of defense he will mount. *See Laura*, 607 F.2d at 56 (citations omitted); *Collins*, 920 F.2d at 625 (citation omitted). "The Sixth Amendment . . . grants to the accused personally the right to make his defense . . . . for it is he who suffers the consequences if the defense fails." *Faretta v. California*, 422 U.S. 806, 819, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975) (footnote omitted). As several courts have recognized, "the most important decision a defendant makes in shaping his defense is his selection of an attorney." *Laura*, 607 F.2d at 56; *accord Collins*, 920 F.2d at 625.

> Not only does the selection of an attorney demark the sphere of defense strategies a defendant will have presented to him; with his selection he may also give his attorney the authority to make decisions for him. For once a lawyer has been selected 'law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas.'
>
> *Laura*, 607 F.2d at 56 (quoting *Faretta*, 422 U.S. at 820, 95 S.Ct. 2525).

Finally, as other courts have pointed out, harmless error analysis is not amenable to the denial of the right to counsel of choice. Requiring a criminal defendant to demonstrate prejudice from the denial of the right to be represented by his chosen counsel would essentially

require the defendant to demonstrate the attorney who represented him at trial rendered deficient assistance, the same showing the defendant would have to make in asserting a claim that he was denied the right to the effective assistance of counsel. Thus, applying harmless error analysis to the denial of the right to counsel of choice would effectively "obliterate" the criminal defendant's Sixth Amendment right to be represented by counsel of his choice, a right the Supreme Court recognized in *Wheat*, by collapsing the right to counsel of choice into the right to receive effective assistance of counsel at trial. *Wilson*, 761 F.2d at 286; *Fuller v. Diesslin*, 868 F.2d 604, 610 (3d Cir. 1989).

IV

We vacate the entry of judgment of conviction against Gonzalez-Lopez and remand the case for a new trial.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 03-3487

UNITED STATES OF AMERICA, APPELLEE

v.

CUAUHTEMOC GONZALEZ-LOPEZ,
ALSO KNOWN AS TOMAS, APPELLANT

May 19, 2005

ORDER DENYING PETITION FOR REHEARING AND FOR REHEARING EN BANC

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. (5128-010199)

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

2

Supreme Court, U.S.
FILED
NOV 18 2005
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No. 05-352

IN THE

Supreme Court of the United States

United States of America
Petitioner,

v.

Cuauhtemoc Gonzalez-Lopez.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

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QUESTION PRESENTED

Whether a district court's denial of a criminal defendant's qualified right to be represented by counsel of choice requires automatic reversal of his conviction.

TABLE OF CONTENTS

QUESTION PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
STATEMENT 1
REASONS FOR DENYING THE WRIT 4
I. THERE IS NO CONFLICT OF AUTHORITY ON THE FACTS OF THIS CASE 5
A. There is No Disagreement in the Lower Courts Concerning How to Remedy a Complete Denial of Counsel of Choice on Direct Review. 6
B. Even if the Seventh Circuit's "Difference in the Quality of Representation" Test Applied on Direct Review of Federal Convictions, Respondent Still Would Be Entitled to Reversal. 9
II. THE GOVERNMENT FAILED PROPERLY TO RAISE THE QUESTION PRESENTED IN THE COURT BELOW. 11
III. THE QUESTION PRESENTED DOES NOT ARISE WITH SUFFICIENT REGULARITY TO MERIT THIS COURT'S REVIEW 12
IV. THE EIGHTH CIRCUIT'S DECISION IS CONSISTENT WITH THIS COURT'S JURISPRUDENCE 15
A. The Sixth Amendment Right to Counsel of Choice Is Distinct from the Sixth Amendment Right to the Effective Assistance of Counsel Once Chosen or Appointed. 16
B. The Government's Proposed *Strickland* Standard Is Incompatible with the Nature of the Independent Right to Counsel of Choice. 19
C. Important Practical Considerations Favor the Eighth Circuit's Approach. 20
CONCLUSION 21

TABLE OF AUTHORITIES

Cases

Arizona v. *Fulminante*, 499 U.S. 279 (1991).....6, 15
Baldwin v. *Reese*, 541 U.S. 27 (2004).....12
Brecht v. *Abrahamson*, 507 U.S. 619 (1993).....7
Chandler v. *Fretag*, 348 U.S. 3 (1954).....17
Chapman v. *California*, 386 U.S. 18 (1967).....6, 15
Davis v. *Alaska*, 415 U.S. 308 (1974).....18
Faretta v. *California*, 422 U.S. 806 (1975).....17
Flanagan v. *United States*, 465 U.S. 259 (1984).....19
Glasser v. *United States*, 315 U.S. 60 (1942).....17, 20
Granfinanciera, S.A. v. *Nordberg*, 492 U.S. 33 (1989).....12
Holloway v. *Arkansas*, 435 U.S. 475 (1978).....20
Lainfiesta v. *Artuz*, 253 F.3d 151 (CA2 2001), cert. denied, 535 U.S. 1019 (2002).....9
Linton v. *Perini*, 656 F.2d 207 (CA6 1981), cert. denied 454 U.S. 1162 (1982).....9
McKaskle v. *Wiggins*, 465 U.S. 168 (1984).....19, 20
Mickens v. *Taylor*, 535 U.S. 162 (2002).....6, 20
Morris v. *Slappy*, 461 U.S. 1 (1983).....13
Neder v. *United States*, 527 U.S. 1 (1999).....6, 15
Powell v. *Alabama*, 287 U.S. 45 (1932).....17, 18
Rodriguez v. *Chandler*, 382 F.3d 670 (CA7 2004), cert. denied, 125 S.Ct. 1303 (2005).....passim
Rompilla v. *Beard*, 125 S.Ct. 2456 (2005).....18
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Sampley v. *Attorney General*, 786 F.2d 610 (CA4), cert. denied, 478 U.S. 1008 (1986).....13
Strickland v. *Washington*, 466 U.S. 668 (1984).....19
United States v. *Addonizio*, 442 U.S. 178 (1979).....7

United States v. *Alvarez-Sanchez*, 511 U.S. 350 (1994) 12
United States v. *Barnett*, 376 U.S. 681 (1964) 17
United States v. *Castro*, 972 F.2d 1107 (CA9 1992) 13
United States v. *Childress*, 58 F.3d 693 (CADC 1995), cert. denied, 516 U.S. 1098 (1996) 6, 13
United States v. *Collins*, 920 F.2d 619 (CA10 1990), cert. denied, 500 U.S. 920 (1991) 12
United States v. *Cronic*, 466 U.S. 648 (1984) 18
United States v. *Dinitz*, 538 F.2d 1214 (CA5 1976), cert. denied, 429 U.S. 1104 (1977) 13
United States v. *Diozzi*, 807 F.2d 10 (CA1 1986) 13
United States v. *Horton*, 845 F.2d 1414 (CA7 1988) 13
United States v. *Jamieson*, 427 F.3d 394 (CA6 2005) 9
United States v. *Mastroianni*, 749 F.2d 900 (CA1 1984) 13
United States v. *Mendoza-Salgado*, 964 F.2d 993 (CA10 1992) 6
United States v. *O'Malley*, 786 F.2d 786 (CA7 1986) 13
United States v. *Panzardi Alvarez*, 816 F.2d 813 (CA1 1987) 6
United States v. *Spears*, 965 F.2d 262 (CA7), cert. denied, 506 U.S. 989 (1992) 13
United States v. *Stites*, 56 F.3d 1020 (CA9 1995), cert. denied, 516 U.S. 1138 (1996) 13
United States v. *Voigt*, 89 F.3d 1050 (CA3 1996) 6
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Other Authorities

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STATEMENT

The government seeks review to press an argument that no court of appeals has ever accepted and that it did not even raise on the merits below: that a defendant who was denied his Sixth Amendment right to be represented at trial by the counsel of his choice is entitled to a new trial only if he can prove that the lawyer he was forced to use was constitutionally ineffective. Particularly in light of subsequent developments in this case, which show that respondent would have been entitled to reversal of his conviction under the existing law in every circuit, certiorari should be denied.

1. On January 7, 2003, the government charged respondent in the Eastern District of Missouri with conspiring to distribute marijuana. Immediately after the arrest, his family hired John Fahle – a Texas attorney who had never previously met respondent – to serve as respondent's counsel. The next day, Fahle appeared at respondent's detention hearing and arraignment. Pet. App. 2a.

Shortly thereafter, respondent telephoned Joseph Low, an attorney in California with a successful track record representing defendants in the Eastern District of Missouri. Pet. App. 2a. Low – a seasoned criminal defense lawyer and a Senior Instructor at Gerry Spence's Trial Lawyers College – has received several national awards for his excellence in the courtroom, including Trial Advocate of the Year from the American Board of Trial Advocates. See The Law Offices of Joseph H. Low IV, Curriculum Vitae, http://www.aggressivecriminaldefenselawyers.com/resume.html (last visited Nov. 16, 2005).

At respondent's request, Low promptly flew to Missouri to discuss the possibility of representing respondent, and ten days later was hired. On March 4, 2003, Low attended an evidentiary hearing on respondent's behalf. Although Low had not yet entered an appearance, the Magistrate Judge accepted Low's provisional entry on the understanding that he

would file a motion for admission pro hac vice. On March 11, 2003, respondent informed Fahle that he wanted Low to be his sole attorney and asked Fahle to withdraw from the case. Pet. App. 2a-3a.

On March 17, 2003, Low filed the first of three applications for admission pro hac vice. The district court denied the application the next day, without explanation. Pet. App. 3a, 8a. Low filed his second pro hac vice application on April 14, 2003, but it was similarly denied without explanation. As a result, Low filed an application for a writ of mandamus in the court of appeals on April 30, 2003, seeking to compel the district court to grant the pro hac vice motion, but that application, too, was denied. Additionally, Low filed a general application for admission to the Eastern District of Missouri. The district court tabled the application, and did not rule on it until several months after submission, well after respondent's trial. *Id.* at 3a.

On April 25, 2003, Fahle moved to withdraw as respondent's counsel and to continue respondent's trial. The district court indicated that it would permit a continuance to be granted only if another attorney entered an appearance on behalf of respondent by May 5, 2003. Accordingly, Karl Dickhaus, whom Low had recruited to serve as his local counsel, entered an appearance on behalf of respondent. Pet. App. 3a-4a. Dickhaus is primarily a consumer protection attorney specializing in "junk fax" law, prosecuting claims under the Telephone Consumer Protection Act. See Junk Fax Attorney Reference, http://www.junkfax.org/fax/basic_info/attorneys.htm (last visited Nov. 16, 2005). Before this case, Dickhaus had never tried a federal criminal case. Despite Dickhaus's lack of relevant experience, Pet. App. 5a, Low chose him to serve as local counsel because Dickhaus was the sole active graduate of Gerry Spence's Trial Lawyers College in the St. Louis area, and Low was confident that his own motion for admission pro hac vice ultimately would be

granted. On July 7, 2003, however, the district court denied Low's third motion for admission pro hac vice. *Ibid.*

2. Respondent's trial began that day. Despite Dickhaus's plea that Low at least be allowed to sit at counsel table to assist him, the court limited Low to the audience section of the courtroom and forbade contact between Low and Dickhaus during trial proceedings. The court even placed a United States Marshal between Dickhaus and Low. The district court did not permit respondent to meet with Low in the morning before the start of trial, during breaks, during lunch, or after the trial concluded for the day. Low was even denied access to the detention facility where respondent was housed in the evenings. Not until the last night of the trial was respondent permitted to meet with Low, even outside the courtroom. Pet. App. 5a.

All of respondent's alleged co-conspirators entered into plea agreements prior to his trial, and several testified against him in return for sentencing recommendations or other consideration from the government. The government's star witness, Jorge Guillen, tied respondent to the conspiracy by testifying that he persuaded respondent to meet him at a mini-mart with money needed for his role in the drug deal. Although Guillen was wired during the interaction, the government claimed at trial that it had lost the tape, making Guillen's testimony critical. Dickhaus was unable to impeach this testimony during cross-examination. Indeed, the trial transcript reveals that Dickhaus's inexperience in federal criminal trials also limited his ability to challenge the government's case in even more fundamental respects. At one point, the court suggested that Dickhaus "[r]ead" the Federal Rules of Evidence after he had difficulty understanding the government's objection and court's evidentiary ruling. Trial Tr. vol. II, 183:2, July 8, 2003.

On July 11, 2003, the jury found respondent guilty of the sole count of the indictment. Pet. App. 5a. The district court sentenced him to 292 months in prison.

3. On appeal, the Eighth Circuit vacated respondent's conviction and remanded for a new trial. Pet. App. 20a. It held that the district court's refusal to allow Low to represent respondent violated respondent's Sixth Amendment right to proceed with the counsel of his choice. *Id.* at 13a. Having found this constitutional violation, the Eighth Circuit held that reversal was required. The court explained that conducting a harmless error analysis would effectively "obliterate" the Sixth Amendment right to be represented by counsel of choice by collapsing it into the right to receive effective assistance of counsel. *Id.* at 19a-20a.

4. After the Eighth Circuit issued this opinion, the government sought rehearing en banc, arguing for the first time that when the district court has violated a defendant's Sixth Amendment right to counsel of his choice, the defendant must show prejudice to obtain a reversal of his conviction. The Eighth Circuit unanimously denied rehearing without elaboration. Pet. App. 21a.

5. After the Eighth Circuit issued its mandate on March 8, 2005, the parties began preparing for a new trial. Low, now representing respondent, deposed Jorge Guillen, the government's key witness. Under intense questioning from Low, Guillen admitted under oath that he lied numerous times during the trial about respondent's involvement in the conspiracy. See, *e.g.*, Guillen Dep. 348:1-7, May 25-26, 2005. In addition to admitting outright lies, Guillen admitted that respondent met him with money on the night of the arrest not to fund a drug deal, but rather in response to Guillen's plea for money to support a sick relative. *Id.* at 301:20-304:4. Shortly thereafter, the government filed this petition for certiorari and convinced the trial court to stay remand proceedings pending this Court's disposition.

REASONS FOR DENYING THE WRIT

Having unanimously lost the primary argument it raised below – that the denial of counsel in this case did not violate the Sixth Amendment – and having recognized that that fact-

bound issue is hardly worthy of this Court's review, the government now seeks, in the absence of any actual split among the circuits, to persuade this Court to adopt an unprecedented rule respecting the proper remedy for this constitutional violation. That rule would require defendants, even after they have established one constitutional violation, also to prove another – namely that their trial attorneys provided ineffective assistance of counsel. The government provides no real reason why these two distinct constitutional rights should be collapsed into one. Nor has it provided any real reason why its novel argument is important enough to warrant this Court's attention. While the government may understandably wish to avoid a retrial at which respondent will be represented by expert counsel who has already demonstrated his ability to effectively cross-examine key government witnesses, that is hardly a legitimate reason to invoke this Court's certiorari power.

I. THERE IS NO CONFLICT OF AUTHORITY ON THE FACTS OF THIS CASE.

No disagreement among the circuits exists that would justify granting certiorari in this case. Every court of appeals that has addressed the question on direct appeal has held that a complete denial of the Sixth Amendment right to choose one's own counsel requires reversal. Although the government claims that the Eighth Circuit's opinion conflicts with the Seventh Circuit's decision in *Rodriguez* v. *Chandler*, 382 F.3d 670 (CA7 2004), cert. denied, 125 S.Ct. 1303 (2005), that is simply inaccurate. Not only did *Rodriguez* involve a different factual scenario arising in a different procedural posture, but respondent would have been entitled to a new trial even under the approach taken by the Seventh Circuit. Thus, there is no genuine conflict.

A. There is No Disagreement in the Lower Courts Concerning How to Remedy a Complete Denial of Counsel of Choice on Direct Review.

1. The First, Third, Eighth, Tenth, and D.C. Circuits – all the courts of appeals that have addressed this issue on direct appeal – have concluded that the erroneous denial of a criminal defendant's right to counsel of choice warrants automatic reversal of the defendant's conviction.[1] See *United States* v. *Panzardi Alvarez*, 816 F.2d 813, 818 (CA1 1987) (holding that "[t]he right to choose one's counsel is an end in itself" and therefore "its deprivation cannot be harmless"); *United States* v. *Voigt*, 89 F.3d 1050, 1074 (CA3 1996) (stating that, although the particular defendant had not been denied his right to counsel of choice, "arbitrary denials of the right to counsel of choice mandate *per se* reversal"); *United States* v. *Mendoza-Salgado*, 964 F.2d 993, 1016 (CA10 1992) (stating that the court would apply an automatic reversal standard when a "trial court unreasonably or arbitrarily interferes with a defendant's right to counsel of choice") (emphasis omitted); *United States* v. *Childress*, 58 F.3d 693, 736 (CADC 1995) (remanding the case to the district court to determine whether the defendant was denied his counsel of choice, and directing that "the deprivation of his counsel of choice would entitle [defendant] to a reversal of his

---

[1] The government admits this point, but attempts to discredit these decisions because they predate this Court's opinions in *Neder* v. *United States*, 527 U.S. 1 (1999), and *Mickens* v. *Taylor*, 535 U.S. 162 (2002). See Pet. Cert. 16 n.6. But neither case in any way supports the government's proposal that criminal defendants whose constitutional rights have been violated be required to prove that the violation prejudiced them. To the extent that *Neder* reiterated the distinction between structural and trial errors, that distinction was well established by the time this Court announced its decision in *Arizona* v. *Fulminante*, 499 U.S. 279 (1991), which predates most of these decisions, and has been implicit since *Chapman* v. *California*, 386 U.S. 18 (1967), which predates them all.

conviction as a matter of constitutional right"), cert. denied, 516 U.S. 1098 (1996).

2. While fully five circuits would apply automatic reversal in these circumstances, not a single circuit has squarely rejected that position. Petitioner argues that the Seventh Circuit's decision in *Rodriguez* creates a circuit conflict, Pet. Cert. 16, but *Rodriguez* is distinguishable on both legal and factual grounds.

As a legal matter, *Rodriguez* arose in a procedural posture in which courts are much less likely to require new trials. *Rodriguez* arose on a habeas appeal challenging a state court determination, whereas the Eighth Circuit's ruling here stems from direct review of a federal district court judgment. "The principle that collateral review is different from direct review resounds throughout [this Court's] habeas jurisprudence." *Brecht* v. *Abrahamson*, 507 U.S. 619, 633 (1993). Indeed, it should "hardly bear[] repeating that 'an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment.'" *Id.* at 634 (quoting *United States* v. *Addonizio*, 442 U.S. 178, 184 (1979)). This is especially so where, as in *Rodriguez*, a petitioner is asking a federal court to upset a *state court* conviction.

Thus, when the Seventh Circuit in *Rodriguez* applied a test for assessing wrongful deprivations of a defendant's right to counsel of choice that required proof of some potential prejudice, the court expressly grounded that test in this Court's approach in *Brecht*, a case that has no bearing on a direct appeal in a federal criminal proceeding. See *Rodriguez*, 382 F.3d at 674. Nothing about *Rodriguez* shows that the Seventh Circuit would have imposed such a requirement on a federal defendant before the court on direct appeal. Especially given that the approach of every other circuit to have addressed the issue would support a rule of automatic reversal in cases on direct appeal, the Seventh Circuit's ruling should fairly be confined to the context in

which it arose. Unless and until a court squarely rejects the rule of automatic reversal already applied by five circuit courts, no circuit split exists on this issue.

As a factual matter, substantial differences between *Rodriguez* and this case belie the government's suggestion that the two decisions actually conflict. The district court in this case completely prevented respondent from using his chosen counsel, and ordered him instead to proceed to trial with an attorney whom respondent never chose to represent him – an attorney who was supposed to perform simply the ministerial role of local counsel. The court further refused to allow respondent's counsel of choice to sit at counsel table to assist the local counsel, who had never tried a federal criminal case; and it even forbade respondent's counsel of choice from visiting respondent at his detention facility until the last night of the trial. Pet. App. 5a. The Eighth Circuit emphasized in its opinion that completely denying respondent the opportunity to be represented by Low rose to the level of a structural error that "affect[s] the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Id.* at 14a. Such a complete denial of one's Sixth Amendment right "infects the entire trial process from beginning to end," *id.* at 18a (internal quotation marks omitted), and thus warrants automatic reversal of conviction.

The injury suffered by the defendant in *Rodriguez*, by contrast, was quite limited. There, the defendant had retained two lawyers, and the district court erroneously denied the defendant use of only one of them, based on an alleged conflict of interest. *Rodriguez*, 382 F.3d at 673. Despite this erroneous denial, the Seventh Circuit repeatedly emphasized that defendant was "represented at trial by at least one lawyer of his own choosing." *Id.* at 674; see also *ibid.* (noting that defendant went to trial "with another lawyer of his own choice"). This constitutional error thus had far less impact on "the entire trial process from beginning to end," *cf.* Pet. App. 18a, because the defendant there was not completely denied

representation by his chosen counsel in the same way respondent was.[2]

B. Even if the Seventh Circuit's "Difference in the Quality of Representation" Test Applied on Direct Review of Federal Convictions, Respondent Still Would Be Entitled to Reversal.

Even if a reviewing court were to apply the Seventh Circuit's potential prejudice inquiry test – which asks whether there is "an identifiable difference in the quality of representation between the disqualified counsel and the attorney who represents the defendant at trial," *Rodriguez*, 382 F.3d at 675 – to the facts of this case, respondent would

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[2] Nor does the Second Circuit's decision in *Lainfiesta* v. *Artuz*, 253 F.3d 151 (CA2 2001), cert. denied, 535 U.S. 1019 (2002), conflict with the Eighth Circuit's holding here. There, too, the case was on collateral review of a state-court conviction and the defendant was not completely denied his right to choice of counsel. See 253 F.3d at 157-58 (confining its analysis to only the question of whether a "*temporary*, arbitrary *deprivation of a second attorney* of choice" required automatic reversal) (emphasis added).

The Sixth Circuit's recent opinion in *United States* v. *Jamieson*, 427 F.3d 394 (CA6 2005), in which the court found no violation of the right to choice of counsel, but suggested that it would have considered the effects of the denial if it had occurred, does not create a split of authority either. There is no evidence that the Sixth Circuit would decide the facts of this case any differently than the Eighth Circuit, especially since Sixth Circuit precedent requires reversal when a defendant is erroneously denied his Sixth Amendment right to retain the counsel of his own choosing. See *Linton* v. *Perini*, 656 F.2d 207, 211-12 (CA6 1981) ("Evidence that a defendant was denied this right [to counsel of choice] arbitrarily and without adequate reason is sufficient to mandate reversal without a showing of prejudice."), cert. denied 454 U.S. 1162 (1982). The dicta in *Jamieson* regarding prejudice does not overrule that longstanding circuit precedent.

still be entitled to a new trial. Accordingly, there is no actual conflict presented that requires this Court's intervention.

"A genuine conflict, as opposed to a mere conflict in principle, arises when it may be said with confidence that two courts have decided the same legal issue in opposite ways, *based on their holdings in different cases with very similar facts.*" Robert L. Stern et al., Supreme Court Practice 226 (8th ed. 2002) (emphasis added). The conflict the government alleges does not meet this standard. The Seventh Circuit itself has indicated that "an identifiable difference in the quality of representation" exists when the defendant's chosen lawyer "had expertise that [the defendant's] other lawyer lacked," or if the chosen lawyer "had planned a line of defense that [the other lawyer] was unable to sustain on his own." *Rodriguez*, 382 F.3d at 675. Both criteria – either one of which would be sufficient to meet the Seventh Circuit's test – are present here.

1. Respondent would be entitled to a new trial in the Seventh Circuit because Low, respondent's disqualified counsel, undeniably "had expertise that [respondent's] other lawyer lacked." *Rodriguez*, 382 F.3d at 675. Low is an experienced, nationally recognized criminal defense attorney with proven success representing defendants in federal drug conspiracy cases within the Eastern District of Missouri. See Pet. App. 2a; *supra* at 1. Dickhaus, in contrast, is a civil consumer protection litigator "who was much less experienced with criminal trials" than was Low. Pet. App. 5a; see *supra* at 2. In fact, prior to representing respondent *in this case*, Mr. Dickhaus had never tried a federal criminal case. *Ibid.* Even without considering what actually happened at trial, the obvious differences in expertise between respondent's chosen lawyer and the lawyer forced upon him by the district court's erroneous refusal to admit his chosen lawyer pro hac vice are enough to satisfy the Seventh Circuit's requirement that there be "an identifiable difference

in the quality of representation" provided by the two lawyers. See *Rodriguez*, 382 F.3d at 675.

2. Low clearly would have advanced "a line of defense that [Dickhaus] was unable to sustain on his own." See *Rodriguez*, 382 F.3d at 675. Since the Eighth Circuit reversed respondent's conviction and remanded the case for a new trial, Low has been representing respondent in preparation for the retrial. In that time, Low has deposed the prosecution's main witness in the first trial, and extracted from him repeated admissions that he had perjured himself on the stand. In particular, he elicited an admission that the witness had lied about respondent's role in the alleged conspiracy. See *supra* at 4. Whereas Dickhaus's trial cross-examination was unable to shake the witness's story and was replete with examples of Dickhaus's inexperience in the criminal trial setting, see *supra* at 3, Low's deposition has so completely discredited the witness that he likely would no longer be a valuable witness for the prosecution.

II. THE GOVERNMENT FAILED PROPERLY TO RAISE THE QUESTION PRESENTED IN THE COURT BELOW.

Certiorari also is inappropriate here for the additional reason that the government failed to raise the argument that it seeks to advance before this Court in a timely manner below. Before the Court of Appeals, respondent expressly argued that the trial court had erred in denying him the right to be represented by Low *and that this error required automatic reversal.* See Appellant's Br. 24. In its responsive brief on the merits, the government argued primarily that this case involved no Sixth Amendment error. See Appellee's Brief at 13-31. Buried in the middle of a paragraph was a single sentence suggesting that "any error was harmless because defendant was represented by able counsel throughout all of the proceedings." *Id.* at 28.

Through its petition for certiorari, the government now advances an entirely different position. It argues that

defendants who have been denied the right to counsel of choice must show prejudice. This is simply too late in the day. Absent "exceptional circumstances" that do not exist here, it is inappropriate for a party to ask this Court to consider the legitimacy of a legal rule that it did not propose below. *United States* v. *Alvarez-Sanchez*, 511 U.S. 350, 360 n.5 (1994); see also *Baldwin* v. *Reese*, 541 U.S. 27, 34 (2004) (deeming argument waived when, *inter alia*, party "did not * * * seek consideration of the argument in th[e] court [below]"); *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 38 (1989) (refusing to hear an argument that, *inter alia*, the party had "failed to raise * * * below"). Prudence "dictates awaiting a case in which the issue was fully litigated below, so that [this Court] will have the benefit of developed arguments on both sides and lower court opinions squarely addressing the question." *Yee* v. *City of Escondido*, 503 U.S. 519, 538 (1992).

III. THE QUESTION PRESENTED DOES NOT ARISE WITH SUFFICIENT REGULARITY TO MERIT THIS COURT'S REVIEW.

The government concedes that there are but "few instances" of the problem that has arisen in this case: the complete, erroneous denial of counsel of choice. Pet. Cert. 15. The government, which is of course a party in *every* criminal prosecution in federal court, can identify only a half-dozen published cases over a twenty-year period that have addressed the question on which it seeks review. *Id.* at 16 n.6.

The rarity of such cases is hardly surprising. "A defendant's right to secure counsel of his choice is cognizable only insofar as defendant is able to retain counsel with private funds." *United States* v. *Collins*, 920 F.2d 619, 625 n.8 (CA10 1990), cert. denied, 500 U.S. 920 (1991). As this Court has made clear, "a defendant may not insist on representation by an attorney he cannot afford." *Wheat* v.

United States, 486 U.S. 153, 159 (1988). Because the vast majority of federal defendants are unable to afford privately retained counsel, and thus are represented by appointed counsel, see United States Department of Justice, Bureau of Justice Statistics, Indigent Defense Statistics (2001), http://www.ojp.usdoj.gov/bjs/id.htm#defendants (last visited Nov. 17, 2005), the right at issue in this case is entirely irrelevant to most criminal cases. Cf. *Morris* v. *Slappy*, 461 U.S. 1 (1983) (holding that a defendant represented by appointed counsel was not entitled to a continuance that would have enabled him to be represented by the particular attorney within the public defender's office whom he preferred).

Even within the small fraction of criminal cases in which defendants are able choose their lawyers, the question of remedy arises only in the rare instances when a trial judge erroneously denies a defendant his right to counsel of choice. Trial courts enjoy substantial "discretion to limit the exercise of the right to counsel of choice when insistence upon it would disproportionately disadvantage the government or interfere with the ethical and orderly administration of justice." *United States* v. *Diozzi*, 807 F.2d 10, 12 (CA1 1986). Furthermore, the district court's decision to deny the defendant counsel of choice is afforded "substantial latitude." *United States* v. *Stites*, 56 F.3d 1020, 1024 (CA9 1995) (quoting *Wheat*, 486 U.S. at 163), cert. denied, 516 U.S. 1138 (1996); see also *United States* v. *Spears*, 965 F.2d 262, 275 (CA7) ("Our review of the district court's decision to remove * * * counsel [of choice] is * * * deferential * * *."), cert. denied, 506 U.S. 989 (1992). As a result, the vast majority of claims alleging erroneous denial of counsel of choice are rejected on the merits.[3]

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[3] See, *e.g.*, *United States* v. *Childress*, 58 F.3d at 734-35 (affirming denial of counsel of choice to avoid the potential for conflict); *United States* v. *Mastroianni*, 749 F.2d 900, 913-14 (CA1 1984) (finding district court acted within discretion by denying

Finally, even in the few instances in which courts of appeals have required new trials to remedy denials of the Sixth Amendment right to counsel of choice, the government provides no support whatsoever for its assertion that these new trials have unduly burdened the justice system or "creat[ed] an unjustified risk that guilty defendants will escape punishment." Pet. Cert. 8. It is hard to understand why being required to re-try one defendant once every several years unduly burdens the government's resources. Nor is it apparent why being required to do so creates a serious risk that the guilty will escape punishment. On the other hand, the proceedings on remand in this case sharply demonstrate why the government's proposed rule would create an unacceptable risk of punishing innocent people. See *supra* at 3-4.

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choice of counsel when it would result in delay); *Sampley* v. *Attorney General*, 786 F.2d 610, 613-16 (CA4) (same), cert. denied, 478 U.S. 1008 (1986); *United States* v. *Silva*, 611 F.2d 78, 79 (CA5 1980) (same); *United States* v. *Dinitz*, 538 F.2d 1214, 1219-24 (CA5 1976) (finding district court acted within discretion by denying choice of counsel because counsel acted improperly), cert. denied, 429 U.S. 1104 (1977); *Ross* v. *Reda*, 510 F.2d 1172 (CA6), (same), cert. denied, 423 U.S. 892 (1975); *United States* v. *Horton*, 845 F.2d 1414, 1418 (CA7 1988) (holding that magistrate did not abuse his discretion in denying defendant's motion to substitute counsel when communication barrier that existed between defendant and counsel was primarily result of defendant's refusal to cooperate and his "stonewalling" effort to select counsel of his choice); *United States* v. *O'Malley*, 786 F.2d 786, 789-93 (CA7 1986) (affirming district court's decision to deny choice of counsel when it would endanger attorney-client privilege); *United States* v. *Castro*, 972 F.2d 1107, 1109 (CA9 1992) (holding that district court properly denied motion to replace counsel when the motion was made only three days before commencement of trial), overruled on other grounds by *United States* v. *Jimenez Recio*, 537 U.S. 270 (2003).

IV. THE EIGHTH CIRCUIT'S DECISION IS CONSISTENT WITH THIS COURT'S JURISPRUDENCE.

The Eighth Circuit held, and the government assumes in its petition, that the trial court violated respondent's Sixth Amendment right to representation by counsel of his choice in wrongfully denying counsel's application for admission pro hac vice. The government now seeks to impose a dual burden upon respondent like none found anywhere else in constitutional law. This new burden would require respondent to prove, in addition to the violation of his Sixth Amendment right to counsel of choice, that the violation prejudiced him by causing another constitutional violation: the delivery of ineffective assistance of counsel.

The government's proposed rule finds no support in this Court's precedents. This Court has held that courts reviewing constitutional errors in criminal trials on direct review should apply one of two approaches. First, "structural errors," which "infect the entire trial process" and distort "the framework within which the trial proceeds," require automatic reversal. *Neder* v. *United States*, 527 U.S. 1, 8 (1999) (citations omitted).

Second, "trial errors," which "occur[] during the presentation of the case to the jury, and which may therefore be quantitatively assessed" in the context of the entire record, *Arizona* v. *Fulminante*, 499 U.S. 279, 307-08 (1991), warrant reversal when the "harmless error" test announced in *Chapman* v. *California*, 386 U.S. 18 (1967), is not met. Under *Chapman*, a constitutional error requires reversal of a defendant's conviction unless "it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Neder*, 527 U.S. at 15 (quoting *Chapman*, 386 U.S. at 24).

The government's petition for certiorari abandons this existing jurisprudence. It does not argue simply that the Eighth Circuit erred by treating denials of the right to counsel

of choice as structural – rather than trial – error. Even persuading this Court to treat denials of the constitutional right to counsel of choice as trial errors would not help the government in this case. The proceedings already conducted on remand demonstrate unequivocally what a properly conducted harmless-error analysis would have concluded: the district court's wrongful exclusion of Low contributed to the verdict obtained. See *supra* at 4, 10-11.

And so the government demands that this Court go even further. Put simply, the government proposes that this Court abandon *Chapman* and this Court's longstanding commitment to harmless-error review and shift the inquiry from whether the *government* can show that a constitutional error was harmless beyond a reasonable doubt to whether the *defendant* can prove not only that constitutional error occurred, but that the constitutional error was harmful. That has never been the law – with respect to any type of constitutional error – and the government provides no reason why it should be. The only rationale the government offers for this radical transformation of constitutional doctrine is that in an area of Sixth Amendment law distinct from that at issue in this case – effective assistance of counsel – this Court has required a defendant, as part of establishing a constitutional error in the first place, to show prejudice. The fact that prejudice may be an element of a quite distinct Sixth Amendment *violation*, however, says absolutely nothing about whether proof of prejudice should be required for a defendant who establishes a Sixth Amendment violation that does not itself require proof of prejudice to receive a *remedy*.

A. The Sixth Amendment Right to Counsel of Choice Is Distinct from the Sixth Amendment Right to the Effective Assistance of Counsel Once Chosen or Appointed.

This Court has long recognized that the Sixth Amendment protects a non-indigent criminal defendant's

right to choose his own counsel. See *Powell* v. *Alabama*, 287 U.S. 45, 53 (1932) ("It is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice."); *Glasser* v. *United States*, 315 U.S. 60, 70, 75 (1942); *Chandler* v. *Fretag*, 348 U.S. 3, 9 (1954); *Wheat* v. *United States*, 486 U.S. 153, 159 (1988).

That right, like the right of self-representation, is more than simply a sub-element of the defendant's interest in receiving competent representation. The framers of the Sixth Amendment understood "the inestimable worth of free choice." *Faretta* v. *California*, 422 U.S. 806, 834 (1975). Among other things, they were well aware that in the notorious 1735 trial of John Peter Zenger, Zenger's original attorneys were disbarred by the court for vigorous advocacy, see *United States* v. *Barnett*, 376 U.S. 681, 715 (1964), and that the court had initially tried to force him to trial with an inferior lawyer. See James Alexander, A Brief Narrative of the Case and Trial of John Peter Zenger, Printer of the New York Weekly Journal 21 (Stanley N. Katz ed. 1972). Forcing upon a paying defendant a lawyer other than his legitimate first choice "can only lead [the defendant] to believe that the law contrives against him." *Faretta*, 422 U.S. at 834.

The right to counsel of choice thus differs from the right to effective assistance in two critical respects. First, the former protects a defendant's autonomy and dignity interests in making a fundamental threshold decision as to who will represent him and how his defense will be presented. The right to effective assistance, by contrast, does not address these concerns. It applies regardless of whether the defendant wishes to secure the representation of any given lawyer.

Second, the choice of trial counsel affects the entire framework within which a defendant's trial occurs. An attorney is responsible, either in consultation with his client or pursuant to his own judgment, for a host of strategic and tactical choices that are impossible to discern after the fact.

An error at this threshold stage is simply not amenable to the type of fine-grained parsing of the trial transcript associated with reviewing claims of ineffective assistance. See, *e.g.*, *Rompilla* v. *Beard*, 125 S.Ct. 2456 (2005).[4]

Contrary to the government's suggestions, nothing this Court said in *Wheat* v. *United States* suggests that these separate Sixth Amendment rights are cut from the same cloth. In reaffirming that "the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment," this Court in *Wheat* also reaffirmed the distinction between that right and the right to effective assistance. 486 U.S. at 159. True, as the government notes, *Wheat* adverted to the requirement of effective assistance in explaining why the defendant had not *improperly* been denied access to his counsel of choice. But that reference does not support the government's argument in this case. *Wheat* simply held that a defendant's choice of counsel cannot override the government's "independent" interest in ensuring that a defendant's choice will not undercut the requirement of effective representation. See *id.* at 160, 162. Thus, under *Wheat* a defendant's interest in choosing his counsel may have to give way when that choice poses a danger of precipitating a later ineffectiveness claim. Of course, the government does not, and cannot, suggest that any such danger existed in this case, since no one has ever suggested a risk that Low would have been ineffective.

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[4] Of course, in some rare circumstances a deficiency in counsel can be so pervasive as to make it likely that "counsel failed to function in any meaningful sense as the Government's adversary." *United States* v. *Cronic*, 466 U.S. 648, 666 (1984). In these rare cases, the Court also has presumed prejudice without inquiry into actual performance at trial. *Id.* at 659-61 (citing *Davis* v. *Alaska*, 415 U.S. 308 (1974), and *Powell* v. *Alabama*, 287 U.S. 45 (1932)).

B. The Government's Proposed *Strickland* Standard Is Incompatible with the Nature of the Independent Right to Counsel of Choice.

Although it is plain that a defendant's right to counsel of choice is distinct and independent from his right to effective assistance of counsel, the government proposes here to collapse the two rights together. The Eighth Circuit properly recognized that no good reason exists to subordinate the right to counsel of choice in this manner.

This Court in *Strickland* required defendants to prove both deficient performance by counsel and prejudice because it included both as elements necessary to show a *violation* of the constitutional right to effective assistance. See *Strickland* v. *Washington*, 466 U.S. 668, 692 (1984) ("any deficiencies in counsel's performance must be prejudicial to the defense in order to *constitute* ineffective assistance under the constitution") (emphasis added). This followed from the Court's conclusion that the right to effective assistance has been violated only where a conviction "resulted from a breakdown in the adversary process that renders the result unreliable." *Id.* at 687.

Here, however, there is no dispute that the Sixth Amendment was violated. The government has not sought review of the Eighth Circuit's determination that respondent's Sixth Amendment right to choice of counsel was *violated* when the district court improperly denied Low's application for admission pro hoc vice.

That being so, inquiring into prejudice would be inconsistent with the understanding that the right to counsel of choice, like the right to self-representation, "reflects constitutional protection of the defendant's free choice independent of concern for the objective fairness of the proceeding." *Flanagan* v. *United States*, 465 U.S. 259, 268 (1984); see also *McKaskle* v. *Wiggins*, 465 U.S. 168, 198 n.6 (1984) (White, J., dissenting). The right to choose one's

counsel "is either respected or denied; its deprivation cannot be harmless." *McKaskle*, 465 U.S. at 177 n.8.

Indeed, in the only other remotely analogous field of Sixth Amendment law – the conflict-of-interest doctrine – this Court also has found violations to constitute structural error. In *Holloway* v. *Arkansas*, 435 U.S. 475, 488 (1978), this Court required automatic reversal where codefendants were forced to accept joint representation over a timely objection on grounds of conflict of interest. See also *Mickens* v. *Taylor*, 535 U.S. 162, 168 (2002). Such cases, like those involving the selection of counsel of choice, also involve defendants who must make an important threshold decision – namely, whether to pursue a coordinated defense or a conflicting defense vis-à-vis their codefendants. "To determine the precise degree of prejudice sustained [when a defendant is denied his choice to pursue a conflicting defense] is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Holloway*, 435 U.S. at 488 (quoting *Glasser* v. *United States*, 315 U.S. 60, 75-76 (1942)). Requiring a defendant, in short, to prove that an error that pervaded his entire trial "prejudiced him in some specific fashion would not be susceptible of intelligent, evenhanded application." *Holloway*, 435 U.S. at 490.

C. Important Practical Considerations Favor the Eighth Circuit's Approach.

Lest there be any remaining doubt concerning the legitimacy of the Eighth Circuit's decision, the balance of burdens on the criminal defendant and government favors reversing in cases like this. If defendants such as respondent could remain convicted of federal crimes for which their counsel of choice would have been able to obtain an acquittal, the defendants would have to serve years in federal prisons. This punishment would be especially hard to bear in light of

the fact that the government would admittedly have deprived these defendants of their fundamental right to choose their attorneys. In this case, for example, respondent would serve his prison sentence knowing that his counsel of choice would have been able to expose the lies of the government's key witness in a way that his other lawyer was unable to do.

By contrast, the burden imposed on the government by automatic reversal of a conviction in the rare case where a defendant was erroneously denied counsel of his choice is comparatively light. In the "few instances" where a court improperly denies a defendant his counsel of choice, Pet. Cert. 15, the government will simply be required to retry him. If the defendant's first trial was in fact not affected by the denial, then the government is likely to secure an outcome identical to the original one, except that its legitimacy will not be stained by the fundamental unfairness inherent in denying the defendant his counsel of choice.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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November 18, 2005

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DEC - 5 2005

No. 05-352

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

CUAUHTEMOC GONZALEZ-LOPEZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF CONTENTS

Page

A. The Eighth Circuit's rule of automatic reversal cannot be reconciled with this Court's Sixth Amendment jurisprudence 1

B. The Eighth Circuit's decision conflicts with the law of the Seventh Circuit 5

C. The Government properly raised the question presented 8

D. The Eighth Circuit's rule of automatic reversal presents a question of recurring importance 9

TABLE OF AUTHORITIES

Cases:

Brecht v. *Abrahamson*, 507 U.S. 619 (1993) 6

Caplin & Drysdale, Chartered v. *United States*, 491 U.S. 617 (1989) 9

Faretta v. *California*, 422 U.S. 806 (1975) 3

Flanagan v. *United States*, 465 U.S. 259 (1984) 1, 9

Florida v. *Nixon*, 125 S. Ct. 551 (2004) 4

Franklin v. *McCaughtry*, 398 F.3d 955 (7th Cir. 2005) ... 6

Harrison v. *McBride*, No. 04-1398, 2005 WL 2787630 (7th Cir. Oct. 25, 2005) 6

Holloway v. *Arkansas*, 435 U.S. 475 (1978) 4

Johnson v. *United States*, 520 U.S. 461 (1997) 10

Mickens v. *Taylor*, 535 U.S. 162 (2002) 2, 4

Morris v. *Slappy*, 461 U.S. 1 (1983) 9

Neder v. *United States*, 527 U.S. 1 (1999) 10

Cases—Continued: Page

Richardson-Merrell Inc. v. *Koller*, 472 U.S. 424 (1985) 1, 9

Rodriguez v. *Chandler*, 382 F.3d 670 (7th Cir. 2004), cert. denied, 125 S. Ct. 1303 (2005) 1, 5, 6, 7

Ungar v. *Sarafite*, 376 U.S. 575 (1964) 9

United States v. *Mechanik*, 475 U.S. 66 (1986) 9, 10

United States v. *Monsanto*, 491 U.S. 600 (1989) 9

United States v. *Williams*, 504 U.S. 36 (1992) 8

Wheat v. *United States*, 486 U.S. 153 (1988) 3, 5, 9

Constitution:

U.S. Const. Amend. VI 1, 2, 4, 6

REPLY BRIEF FOR THE UNITED STATES

The Eighth Circuit has squarely decided a question that this Court noted but left unresolved in *Flanagan* v. *United States*, 465 U.S. 259, 267-269 (1984): whether a criminal defendant is entitled to automatic reversal of his conviction when the district court erroneously denies him representation by counsel of choice. See *Richardson-Merrell Inc.* v. *Koller*, 472 U.S. 424, 438 (1985) (leaving comparable question open in a civil case and citing *Flanagan*). This Court should definitively resolve that issue now because, contrary to respondent's contentions, the court of appeals' rule of automatic reversal is fundamentally at odds with this Court's jurisprudence under the Sixth Amendment; its holding conflicts with the Seventh Circuit's decision in *Rodriguez* v. *Chandler*, 382 F.3d 670 (2004), cert. denied, 125 S. Ct. 1303 (2005); and the matter is of recurring importance to the administration of justice.

A. The Eighth Circuit's Rule Of Automatic Reversal Cannot Be Reconciled With This Court's Sixth Amendment Jurisprudence

Respondent's defense of the Eighth Circuit's rule (Br. in Opp. 15-20) assumes that the erroneous denial of the right to counsel of choice in and of itself violates the Sixth Amendment. He then argues that the violation must be classified as structural error. Both elements of that argument depart from this Court's Sixth Amendment jurisprudence.[1]

[1] Respondent also erroneously contends (Br. in Opp. 19) that "there is no dispute that the Sixth Amendment was violated." But the entire thrust of the government's petition is that, consistent with this Court's Sixth Amendment precedents, respondent cannot establish a consti-

As a general rule, "defects in assistance [of counsel] that have no probable effect upon the trial's outcome do not establish a constitutional violation." *Mickens* v. *Taylor*, 535 U.S. 162, 166 (2002). This Court has recognized an exception to that rule only when "the likelihood that the verdict is unreliable is so high that a case-by-case inquiry is unnecessary." *Ibid.* There is no basis for limiting that principle to ineffective-assistance cases; all claimed Sixth Amendment right-to-counsel violations must be linked to the purpose of that right, *i.e.*, to protect the reliability of the verdict. *Ibid.* Respondent's complaint here—that he was compelled to go to trial with his second-choice counsel—clearly does not create such a high likelihood of unreliability that case-by-case inquiry is unnecessary. Accordingly, respondent's view that the Constitution was violated and that reversal is warranted, without *any* showing of prejudice, departs from this Court's analysis of claimed Sixth Amendment violations.[2]

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tutional violation without demonstrating that the denial of counsel of choice subverted the fairness of his trial. See Pet. 8-19. While the government accepts for purposes of this Court's review that "the district court's refusal to admit Low *pro hac vice* was unjustified," Pet. 5 n.2, it does not accept that such refusal constituted a violation of the Sixth Amendment.

[2] Respondent contends (Br. in Opp. 15) that the government's proposed standard would require him to prove ineffective assistance of counsel in order to vindicate his right to counsel of choice and thus would "collapse the two rights together" (*id.* at 19). As explained in the petition (Pet. 14-15), that suggestion is incorrect. Significantly, respondent does not even mention the government's alternative proposal (see Pet. 15-16), under which respondent would be relieved of showing that his counsel provided deficient performance but would still have to show that his counsel of choice would have conducted the trial differently and that, in so doing, would have created a reasonable

Respondent argues (Br. in Opp. 16-18, 20) that a defendant challenging the erroneous rejection of his first-choice counsel should be relieved of the need to show prejudice, and that the error should be treated as structural, based on two factors. Neither of those factors finds support in this Court's authority.

First, citing *Faretta* v. *California*, 422 U.S. 806, 834 (1975), respondent equates the right to counsel of choice with the right to self-representation in that they both "protect[] a defendant's autonomy and dignity interests." Br. in Opp. 17. But *Faretta* did not even address the right to counsel of choice. And to the extent that the right to counsel of choice may further autonomy interests, this Court has made clear that such interests may be subordinated to concerns about, *inter alia*, the effective administration of justice. *Wheat* v. *United States*, 486 U.S. 153, 159-160 (1988). In that respect, respondent's autonomy interest is far weaker than that of a defendant electing self-representation. See *id.* at 159 n.3. Moreover, denial of a defendant's first-choice counsel does not necessarily deprive him of *all* choice; as in this case, such a defendant may still be represented by counsel accepted or selected by him.[3] Autonomy concerns in the counsel-of-first-choice context thus should

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probability of obtaining an acquittal. The Seventh Circuit has also formulated a prejudice test borrowed from this Court's conflict-of-interest cases, which again does not require proving constitutional ineffectiveness. See p. 5, *infra*.

[3] Respondent states (Br. in Opp. 8) that he "never chose" Dickhaus to represent him. In fact, in May 2003, respondent retained Dickhaus "as his local counsel to assist Mr. Low in the trial of this matter and to handle motion hearings, filings and other local responsibilities." Resp. C.A. Br. 15. Respondent has also informed the district court that he wants Dickhaus to assist Low in the event of a retrial. 09/01/05 Tr. 7.

receive minimal weight in determining whether an erroneous deprivation should invalidate a conviction.

Second, respondent argues (Br. in Opp. 17) that the denial of the right to counsel of choice is not amenable to review for prejudice because, unlike ineffective-assistance claims, the error "affects the entire framework" of the defendant's trial. The same, however, could be said about ineffective-assistance claims based upon, *inter alia*, failure to pursue a particular defense theory or to contest an element of the government's case. Yet, under this Court's cases, defendants asserting such claims are not relieved of proving prejudice. See, *e.g.*, *Florida* v. *Nixon*, 125 S. Ct. 551 (2004). Similarly, Sixth Amendment conflict-of-interest claims can be said to implicate "the entire framework" of the trial, but this Court has made clear that a defendant asserting such a claim generally must establish, at a minimum, that the conflict adversely affected his lawyer's performance. See *Mickens*, 535 U.S. at 174.

Respondent relies (Br. in Opp. 20) on *Holloway* v. *Arkansas*, 435 U.S. 475 (1978), where the Court applied a rule of automatic reversal to a situation in which the defendant's lawyer jointly represented co-defendants over his own objection, but that case does not support the Eighth Circuit's automatic reversal rule. As this Court explained in *Mickens*, the rule of *Holloway* constitutes a narrow exception to the prejudice requirement which is justified by "the high probability of prejudice arising from multiple concurrent representation, and the difficulty of proving that prejudice." 535 U.S. at 175. Proceeding to trial with second-choice counsel does not inherently create a "high probability of prejudice"; respondent does not claim otherwise.

Finally, contrary to respondent's contention (Br. in Opp. 18), the Eighth Circuit's rule of automatic reversal cannot be squared with this Court's decision in *Wheat*. The Court there, while recognizing that the right to counsel of choice is "comprehended by the Sixth Amendment," 486 U.S. at 159, emphasized that "the essential aim of the [Sixth] Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers," *ibid.* For that reason, this Court explained, "in evaluating Sixth Amendment claims, the appropriate inquiry focuses on the adversarial process, not on the accused's relationship with his lawyer as such." *Ibid.* (internal quotation marks omitted). The Eighth Circuit's rule of automatic reversal nevertheless gives controlling weight to the attorney-client relationship that the defendant was denied without any consideration of the impact the deprivation may have had on the adversarial process.

B. The Eighth Circuit's Decision Conflicts With The Law Of The Seventh Circuit

Recognizing that a rule of automatic reversal for denial of counsel of choice does "not make sense" under this Court's precedents, the Seventh Circuit rejected such a rule in *Rodriguez*, in favor of a rule requiring the defendant to show that the error had an "adverse effect" on his representation at trial. 382 F.3d at 674, 675. Notwithstanding *Rodriguez*'s clear rejection of automatic reversal, respondent maintains (Br. in Opp. 5) that "[t]here is no genuine conflict" because *Rodriguez* was a habeas case presenting different facts and because he would be entitled to relief under *Rodriguez*'s approach. Respondent's contentions lack merit.

First, while it is undoubtedly true as a general rule that "courts are much less likely to require new trials" on habeas review (Br. in Opp. 7) and that "an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment" (*ibid.*) (quoting *Brecht* v. *Abrahamson*, 507 U.S. 619, 634 (1993)), those general observations do not apply here. That is because in the Seventh Circuit, a structural error justifies relief on habeas (assuming the claim of error is preserved) without inquiry into prejudice, just as it does on direct appeal. See *Franklin* v. *McCaughtry*, 398 F.3d 955, 960-962 (7th Cir. 2005) (granting habeas relief on claim that the trial judge was biased without requiring proof of prejudice and faulting state court for applying harmless-error review to structural error); see also *Harrison* v. *McBride*, No. 04-1398, 2005 WL 2787630 (7th Cir. Oct. 27, 2005). *Rodriguez* thus forecloses any claim in the Seventh Circuit that the denial of counsel of choice is a structural error that triggers automatic reversal—whether the claim is asserted on direct or collateral review.

Respondent further asserts the absence of a conflict on the basis of factual differences between this case and *Rodriguez*. As explained in the petition (Pet. 18 n.7), those differences do not negate the conflict. The *Rodriguez* court made clear that it was adopting the "adverse effect" standard for all claims that "the [trial] court wrongly stripp[ed] the defendant of his preferred lawyer" (382 F.3d at 675) and not merely for those cases in which the defendant continues to be represented by one counsel of choice. That uniform standard for choice-of-counsel claims followed from the court's categorical rejection of a rule of automatic reversal as inconsistent with this Court's Sixth Amendment cases. *Id.* at 674-

675. The *Rodriguez* court noted the fact that the defendant continued to be represented by one of his two chosen counsel not to limit the scope of its "adverse effect" standard, but to emphasize that a rule of automatic reversal is "particularly" illogical in that circumstance. *Id.* at 674.

Finally, respondent contends that the decision below and *Rodriguez* are not in "actual conflict" (Br. in Opp. 10) because he would satisfy the Seventh Circuit's "adverse effect" test. No court has determined, however, that respondent could establish an "adverse effect" on his representation, and it is anything but clear that he could. Respondent contends (*ibid.*) that he could prevail in the Seventh Circuit simply by pointing to Low's greater experience in handling criminal trials. But *Rodriguez* suggested only that an adverse effect "might" be shown if the preferred lawyer "had expertise that his other lawyer lacked," 382 F.3d at 675, and other statements in the court's opinion indicate that the standard might require a showing that is more concrete: "[disqualified counsel] has not filed an affidavit detailing what he would have done differently had he conducted the trial or how the defense otherwise might have been affected by his absence." *Ibid.*

Respondent contends (Br. in Opp. 11) that he could satisfy that more concrete showing because Low has taken the deposition of a government witness and "completely discredited [him]."[4] That disputed proposition could be tested, however, only at the type of evidentiary hearing that the Eighth Circuit's rule has rendered su-

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[4] That deposition of witness Jorge Guillen was not part of the record before the district court or the court of appeals. The deposition took place after rehearing en banc was denied and the government learned that three of its witnesses were facing imminent deportation.

perfluous. Moreover, even if it were conceded that a defendant's back-up counsel-of-choice was a better, more vigorous advocate, the Eighth Circuit's rule would mandate reversal. The oddity of a rule that would require reversal even if substitute counsel were a modern-day Clarence Darrow justifies review, regardless of how petitioner might fare under *Rodriguez* or any other actual-prejudice test this Court might announce.

C. The Government Properly Raised The Question Presented

Respondent's contention (Br. in Opp. 11-12) that the court of appeals' decision is a poor vehicle because the government did not properly challenge the automatic reversal rule below is equally without merit. The government argued in its court of appeals brief that any error by the district court in denying Low admission *pro hac vice* was harmless because respondent "was represented by able counsel throughout all of the proceedings." Gov't C.A. Br. 28. Respondent did not consider the government's argument waived, see Resp. C.A. Reply Br. 22-23, nor did the court of appeals, which engaged in an extensive, though flawed, analysis of the nature of the district court's error in concluding that the error required automatic reversal. See Pet. App. 13a-20a. The question presented was thus both "pressed" *and* "passed upon." *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (holding that either is sufficient for a grant of certiorari). The question whether automatic reversal is appropriate thus is squarely and properly presented for this Court's review.

D. The Eighth Circuit's Rule Of Automatic Reversal Presents A Question Of Recurring Importance

Respondent's contention (Br. in Opp. 12-14) that the question presented is not important enough to warrant this Court's review is wrong on several counts. First, challenges to the denial of counsel of choice arise on a regular basis. Such challenges are made when, *inter alia*, an attorney is disqualified for a conflict of interest, see *Wheat*, *supra*, a continuance is denied, see *Ungar* v. *Sarafite*, 376 U.S. 575 (1964), or a defendant's assets are frozen, see *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617 (1989); *United States* v. *Monsanto*, 491 U.S. 600 (1989). Courts faced with such common challenges should have the benefit of this Court's guidance on the disposition of those cases, such as this one, in which the denial of counsel of choice is found to be erroneous.

Second, the question presented is hardly a novel one. This Court has adverted to the issue twice, see *Flanagan*, *supra*, and *Richardson-Merrell*, *supra*, and a majority of the circuits have decided it. See Pet. App. 16a (citing numerous circuit court decisions that have adopted automatic reversal and acknowledging conflicting authority).

Finally, respondent's attempt to minimize the significance of the rule of automatic reversal rings hollow. As this Court has repeatedly emphasized, "[t]he reversal of a conviction entails substantial societal costs: it forces jurors, witnesses, courts, the prosecution, and the defendants to expend further time, energy, and other resources to repeat a trial that has already once taken place." *United States* v. *Mechanik*, 475 U.S. 66, 72 (1986) (citing *Morris* v. *Slappy*, 461 U.S. 1, 14 (1983)).

And because of the "passage of time, erosion of memory, and dispersion of witnesses," *ibid.* (brackets and internal quotation marks omitted), requiring a retrial will sometimes "cost society the right to punish admitted offenders" and, even when retrial does not carry that high cost, "the intervening delay may compromise society's interest in the prompt administration of justice," *ibid.* (internal quotation marks omitted). These consequences are simply not "acceptable" (*ibid.*) here because there is no reason to believe that proceeding to trial with second-choice counsel, as respondent did, has automatically "deprived a defendant of a fair determination of the issue of guilt or innocence." *Ibid.*; see *Neder* v. *United States*, 527 U.S. 1, 8-9 (1999); *Johnson* v. *United States*, 520 U.S. 461, 468-469 (1997).

* * * * *

For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

DECEMBER 2005

Supreme Court, U.S.
FILED
FEB 21 2006
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No. 05-352

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

CUAUHTEMOC GONZALEZ-LOPEZ

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a district court's denial of a criminal defendant's qualified right to be represented by counsel of choice entitles the defendant to automatic reversal of his conviction.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional provision involved	2
Statement	2
Summary of argument	8
Argument:	
The denial of the qualified right to be represented by counsel of choice does not warrant automatic reversal	11
A. The right to counsel of choice is qualified	11
B. A defendant who is denied his counsel of choice must show an adverse effect on his right to a fair trial	13
1. The Sixth Amendment is not violated absent an adverse effect on the trial process	14
2. A defendant has the burden to show prejudice from the denial of the right to counsel of choice	15
3. A presumption of prejudice is not warranted	17
4. The Seventh Circuit's "adverse effect" standard properly recognizes that automatic reversal is unwarranted, but places too little burden on the defendant to show prejudice	21
C. The court of appeals erred in holding that an erroneous denial of counsel of choice reflects a defect in the trial mechanism and defies harmless-error analysis	24
1. The qualified right to counsel of choice is not so fundamental to our system of justice that its impairment mandates automatic reversal	24
2. The court of appeals' reasoning is flawed	26
Conclusion	31

TABLE OF AUTHORITIES

Page

Cases:

Arizona v. *Fulminante*, 499 U.S. 279 (1991) 7, 25
Bell v. *Cone*, 535 U.S. 685 (2002) 18
Brecht v. *Abrahamson*, 507 U.S. 619 (1993) 25
Brooks v. *Tennessee*, 406 U.S. 605 (1972) 18
Caplin & Drysdale, Chartered v. *United States*, 491 U.S. 617 (1989) 12
Cuyler v. *Sullivan*, 446 U.S. 335 (1980) 18, 20, 27
Faretta v. *California*, 422 U.S. 806 (1975) 28, 29
Ferguson v. *Georgia*, 365 U.S. 570 (1961) 18
Flanagan v. *United States*, 465 U.S. 259 (1984) 7, 28
Fuller v. *Diesslin*, 868 F.2d 604 (3d Cir.), cert. denied, 493 U.S. 873 (1989) 21
Geders v. *United States*, 425 U.S. 80 (1976) 17
Gideon v. *Wainwright*, 372 U.S. 335 (1963) 17, 25
Hamilton v. *Alabama*, 368 U.S. 52 (1961) 17
Herring v. *New York*, 422 U.S. 853 (1975) 17
Holloway v. *Arkansas*, 435 U.S. 475 (1978) 18
Johnson v. *United States*, 520 U.S. 461 (1997) 25
Johnson v. *Zerbst*, 304 U.S. 458 (1938) 17
McKaskle v. *Wiggins*, 465 U.S. 168 (1984) 25, 27, 28, 29
Martinez v. *Court of Appeal*, 528 U.S. 152 (2000) 29
Massaro v. *United States*, 538 U.S. 500 (2003) 22
Mickens v. *Taylor*, 535 U.S. 162 (2002) ..... *passim*
Morris v. *Slappy*, 461 U.S. 1 (1983) 12
Neder v. *United States*, 527 U.S. 1 (1999) .. 6, 21, 25, 26, 27
Powell v. *Alabama*, 287 U.S. 45 (1932) 12, 18
Rodriguez v. *Chandler*, 382 F.3d 670 (7th Cir. 2004), cert. denied, 125 S. Ct. 1303 (2005) 21, 22, 24, 26
Rose v. *Clark*, 478 U.S. 570 (1986) 25
Strickland v. *Washington*, 466 U.S. 668 (1984) ..... *passim*
Sullivan v. *Louisiana*, 508 U.S. 275 (1993) 25

Cases—Continued: Page

Tumey v. *Ohio*, 273 U.S. 510 (1927) 25
United States v. *Ash*, 413 U.S. 300 (1973) 12
United States v. *Cronic*, 466 U.S. 648 (1984) 12, 13, 14, 15, 17, 18
United States v. *Diozzi*, 807 F.2d 10 (1st Cir. 1986) 13
United States v. *Gonzalez-Lopez*, 403 F.3d 558 (8th Cir. 2005) 4
United States v. *Gouveia*, 467 U.S. 180 (1984) 12
United States v. *Mechanik*, 475 U.S. 66 (1986) 31
United States v. *Mendoza-Salgado*, 964 F.2d 993 (10th Cir. 1992) 12, 20
United States v. *Morrison*, 449 U.S. 361 (1981) 11, 14, 16, 24
United States v. *Panzardi Alvarez*, 816 F.2d 813 (1st Cir. 1987) 21
United States v. *Santos*, 201 F.3d 953 (7th Cir. 2000) 16, 26
United States v. *Walters*, 309 F.3d 89 (9th Cir. 2002), cert. denied, 540 U.S. 846 (2003) 19, 20, 23
United States v. *Voigt*, 89 F.3d 1050 (3d Cir.), cert. denied, 519 U.S. 1047 (1996) 20, 30
Vasquez v. *Hillery*, 474 U.S. 254 (1986) 25
Waller v. *Georgia*, 467 U.S. 39 (1984) 25
Wheat v. *United States*, 486 U.S. 153 (1988) 8, 11, 12, 13, 29, 30
White v. *Maryland*, 373 U.S. 59 (1963) 17
Wilson v. *Mintzes*, 761 F.2d 275 (6th Cir. 1985) 20
Young v. *City of Providence*, 404 F.3d 4 (1st Cir. 2005) .. 21

Constitution, statutes and rule:

U.S. Const. Amend. VI ..... *passim*
Assistance of Counsel Clause 29
21 U.S.C. 841(a)(1) 2

Statute and rule—Continued: Page
21 U.S.C. 846 2
Mo. Ann. Stat., Rule of Professional Conduct 4-4.2
(West 2002) 6

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ON WRIT OF CERTIORARI
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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 399 F.3d 924. The opinion of the court of appeals in a related case, reversing the district court's imposition of sanctions against respondent's counsel of choice, is reported at 403 F.3d 558.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 2005. A petition for rehearing was denied on May 19, 2005 (Pet. App. 21a). On August 2, 2005, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including September 16, 2005, and the petition was filed on that date. The petition for a writ of certiorari was granted on January 6, 2006. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT

Following a jury trial, respondent was convicted in the United States District Court for the Eastern District of Missouri on one count of conspiring to distribute more than 100 kilograms of marijuana, in violation of 21 U.S.C. 841(a)(1) and 21 U.S.C. 846. He was sentenced to 292 months of imprisonment. The court of appeals reversed, holding that the district court erred in denying the applications for admission *pro hac vice* of respondent's chosen attorney, thereby denying respondent of his Sixth Amendment right to be represented by counsel of choice. The court of appeals further held that the district court's error required automatic reversal of respondent's conviction, without regard to whether respondent received a fair trial when he was represented by his remaining chosen counsel. Pet. App. 1a-20a.

1. On January 7, 2003, a grand jury sitting in the Eastern District of Missouri charged respondent with conspiring to distribute more than 100 kilograms of marijuana. Respondent was arrested after he provided approximately

$10,000 hidden in an oatmeal box to pay drug couriers. Officers later uncovered from respondent's residence more than $100,000 secreted behind a baseboard in the kitchen. 3 Tr. 43-45, 66.

Respondent's family hired Texas attorney John Fahle to represent respondent. Fahle thereafter appeared on respondent's behalf at the arraignment and detention hearing. Shortly after he was arraigned, respondent called California attorney Joseph Low to discuss the possibility of Low's either assisting Fahle or replacing him. Respondent had learned of Low's reputation as a trial attorney from the defendants in another drug conspiracy case in the same district. After meeting with Low at the jail in Farmington, Missouri, respondent retained him. Pet. App. 2a.

On March 4, 2003, both Fahle and Low attended an evidentiary hearing on behalf of respondent. Although Low had not yet entered an appearance, the Magistrate Judge accepted Low's provisional entry with the understanding that Low would file a motion for admission to the United States District Court for the Eastern District of Missouri *pro hac vice*. The Magistrate Judge subsequently rescinded Low's provisional entry when Low violated the district court's rule restricting cross-examination of a witness to one lawyer. Pet. App. 2a-3a.

One week later, respondent informed Fahle that he wanted Low to be his sole attorney. On March 17, 2003, Low filed an application for admission *pro hac vice*. The district court denied Low's application the following day. Low filed a second application for admission *pro hac vice* on April 14, 2003. That application was also denied. Respondent then filed a petition for a writ of mandamus in the court of appeals, seeking to compel the district court to admit Low. The court of appeals denied that petition on May 12, 2003. Pet. App. 3a.

On April 25, 2003, Fahle moved to withdraw as counsel for respondent and to continue respondent's trial. The district court granted both motions and ordered respondent to retain new counsel by May 5, 2003.[1] On advice from Low, respondent retained local attorney Karl Dickhaus. Subsequently, on June 3, 2003, the district court issued an order explaining why it had denied Low's motions for admission *pro hac vice*. Pet. App. 3a-4a. The court indicated that, in another case before it, Low had "contacted a criminal defendant with pre-existing legal representation, interfered with the criminal defendant's representation, and attempted to circumvent the Court's ruling on a continuance of the trial setting." *Id.* at 4a (quoting district court's June 3, 2003, order).

On July 7, 2003, respondent's trial commenced. That day, the district court denied Low's third motion for admission *pro hac vice* and Dickhaus's request that Low be permitted to sit at counsel table. The district court restricted Low to the public section of the courtroom and forbade contact between Low and Dickhaus during trial proceedings. Respondent was unable to meet with Low until the district court, upon learning that Low had been prevented from visiting respondent at the jail, ordered that jail visits by Low be permitted. On July 11, 2003, the jury found respondent guilty on the sole conspiracy count. Pet. App. 5a.

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[1] Fahle also moved for sanctions against Low, contending that Low had violated Missouri's rules of professional conduct by communicating with respondent without Fahle's permission. Pet. App. 3a-4a. The district court granted Fahle's motion for sanctions on August 23, 2003, more than a month after respondent was convicted of the drug trafficking charge. *Id.* at 5a. The court of appeals reversed the district court's order granting sanctions against Low. *United States* v. *Gonzalez-Lopez*, 403 F.3d 558 (8th Cir. 2005) (appeal of Joseph Low).

2. The court of appeals reversed based on respondent's inability to have Low represent him at trial. Pet. App. 1a-20a. The court of appeals addressed "only the primary argument raised by [respondent] challenging the district court's denial of admission pro hac vice to the attorney he selected to represent him in the criminal proceeding." *Id.* at 6a. The court initially observed that "[a] non-indigent criminal defendant's Sixth Amendment rights encompass the right to be represented by the attorney selected by the defendant." *Ibid.* At the same time, the court of appeals explained that the right to counsel of choice "is not absolute," *id.* at 7a, but rather must be "carefully balance[d] * * * against the court's interest in the orderly administration of justice." *Ibid.* (internal quotation marks omitted).

The court of appeals found it "clear from the record in this case [that] the district court denied [Low's] application for pro hac vice admission because the court believed Low violated [Missouri Rule of Professional Conduct 4-4.2] when Low communicated with the represented defendants in [*United States* v. *Serrano, et al.*, No. 4:01CR450-JCH (E.D. Mo.)] without obtaining permission from the attorneys who represented them at the time." Pet. App. 11a. As it explained in its companion decision, see *United States* v. *Gonzalez-Lopez*, 403 F.3d 558 (8th Cir. 2005) (appeal of Joseph Low), the court of appeals determined that the district court's interpretation of that Missouri Rule of Professional Conduct was "not correct," because the rule forbade contact only when the attorney was representing another party in the matter. Pet. App. 11a.[2] In particular, the court of ap-

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[2] The court of appeals noted that "[t]here is no suggestion in the [district court's] order that Low was representing any other party in the case when he communicated with the [*Serrano*] defendants." Pet. App. 10a. In fact, during the time at issue, Low did represent one of the defendants in the *Serrano* case. See Gov't Pet. for Panel Reh'g 3-4.

peals reasoned, "the district court's interpretation of Rule 4-4.2 would unjustifiably prevent parties in a litigation from consulting with other attorneys to obtain alternative advice, hire additional counsel, or hire different counsel." *Id.* at 12a.

The court of appeals acknowledged that "an attorney's past ethical violations may affect the administration of justice within the court and therefore outweigh the Sixth Amendment presumption in favor of the defendant's counsel of choice." Pet. App. 13a. The court of appeals, however, found it "clear from the record [that respondent's] Sixth Amendment right played no part in the district court's decision to deny Low pro hac vice admission." *Ibid.* The court therefore concluded that "the district court erred in denying Low's application for admission pro hac vice." *Ibid.*

Next, the court of appeals held that the error "results in automatic reversal of the conviction." Pet. App. 16a. The court acknowledged that "most constitutional errors in criminal trials do not require automatic reversal of the conviction," *id.* at 13a (citing *Neder* v. *United States*, 527 U.S. 1, 7-8 (1999)), and that *Neder* had narrowed the exceptions to only "a limited class of constitutional errors" that "are so intrinsically harmful as to require automatic reversal * * * without regard to their effect on the outcome," *id.* at 14a (quoting *Neder*, 527 U.S. at 7). The court of appeals further observed that this Court "has not decided whether harmless error review applies to the denial of the Sixth Amendment right to be represented by the attorney chosen by the defendant." *Id.* at 15a. The court nevertheless sided with "the majority of circuit courts" (*id.* at 16a) that held, before

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The government nevertheless does not challenge in this Court the court of appeals' ruling that the district court's refusal to admit Low *pro hac vice* was unjustified.

Neder, that "a criminal defendant who is denied the Sixth Amendment right to be represented by his chosen attorney does not have to demonstrate prejudice to obtain the reversal of the conviction." *Id.* at 15a-16a (citing cases).

The court of appeals reasoned that "the denial of the right to counsel of choice clearly belongs in the class of fundamental constitutional errors which reflect a defect in the framework of the trial mechanism and 'defy analysis by harmless-error standards.'" Pet. App. 17a (quoting *Arizona* v. *Fulminante*, 499 U.S. 279, 309 (1991) (citation omitted)). The court first explained that, unlike "trial error[s]" that are properly subject to harmless-error review, *id.* at 16a, the denial of counsel of choice, "[l]ike the denial of the right to self-representation and the denial of the right to counsel, * * * infects the entire trial process," *id.* at 18a (internal quotation marks omitted), such that it cannot be "quantitatively assessed in the context of other evidence presented," *id.* at 16a (internal quotation marks omitted). The court carried the analogy to the right of self-representation one step further, explaining that the denial of either right can "never be harmless," because both rights "reflect[] constitutional protection of the defendant's free choice independent of concern for the objective fairness of the proceeding." *Id.* at 18a-19a (quoting *Flanagan* v. *United States*, 465 U.S. 259, 268 (1984)).

Finally, the court of appeals concluded that "[r]equiring a criminal defendant to demonstrate prejudice from the denial of the right to be represented by his chosen counsel would essentially require the defendant to demonstrate [that] the attorney who represented him at trial rendered deficient assistance." Pet. App. 19a-20a. That, the court added, "would effectively obliterate the criminal defendant's Sixth Amendment right to be represented by counsel of his choice, * * * by collapsing th[at] right * * * into the

right to receive effective assistance of counsel at trial." *Id.* at 20a (internal quotation marks omitted). Accordingly, the court of appeals vacated respondent's conviction and remanded for a new trial. *Ibid.*

SUMMARY OF ARGUMENT

A. A defendant who claims that he was improperly deprived of counsel of choice must establish prejudice in order to overturn his conviction. This Court has held that the Sixth Amendment protects a non-indigent defendant's right to select the counsel who will represent him in a criminal case, but has also stated that the right is "circumscribed in a number of important respects." *Wheat* v. *United States*, 486 U.S. 153, 159 (1988). A defendant cannot retain an attorney he cannot afford. Nor can a defendant insist on representation by a non-lawyer or by a lawyer who has an actual conflict of interest or a serious potential for such a conflict. Those limitations reflect that the core purpose of the right to counsel is to ensure a fair trial through adversary testing of the government's case, and that goal can readily be achieved without according the defendant an absolute right to select his counsel.

B. Consistent with the subordinate nature of the right to counsel of choice, a defendant who was erroneously denied representation by his first-choice attorney should not obtain automatic reversal. The general Sixth Amendment rule is that infringements of the counsel right require a showing of prejudice for a defendant to obtain relief. Most notably, this Court has made clear that the absolute right to the effective assistance of counsel requires proof of both deficient performance *and* prejudice to justify relief. *Strickland* v. *Washington*, 466 U.S. 668 (1984). That is because, absent a probable effect on the outcome, the purpose of the Counsel guarantee is not infringed. If a defendant

who is deprived of the absolute right to a competent attorney must show prejudice to win relief, a defendant who is deprived of the qualified right to counsel of choice must similarly show prejudice.

There is no basis for saying that a trial is inherently unfair if a defendant is deprived of his counsel of first choice, and thus no basis for presuming prejudice. To the contrary, such a defendant may, and probably will, be represented by equally adept, second-choice counsel, who is equivalently faithful to his client's strategic preferences. In that situation, the trial surely cannot be regarded as inherently flawed.

To the extent that *Wheat* means that the denial of counsel of choice may entitle a defendant to a reversal even when substitute counsel rendered effective assistance, a defendant making a claim under *Wheat* should be relieved of showing that his second-choice counsel performed deficiently. But he should still be required to show that counsel of choice would have performed differently, and that his representation therefore would have led to a reasonable probability of a different outcome. Such a showing would not be unduly onerous for a defendant, yet would properly protect criminal convictions against reversals where there is no reason to believe the outcome would have been different if the defendant had been represented by counsel of choice.

C. The court of appeals' conclusion that denials of counsel of choice require automatic reversal is fundamentally flawed. The right to counsel of choice cannot be compared to those few rights that this Court has treated as mandating automatic reversal, such as the right to an unbiased judge or the complete denial of counsel. Those infringements preclude a criminal trial from reliably determining

guilt. Proceeding to trial with second-choice counsel does not have that effect.

The court of appeals believed that automatic reversal is in order because, like the right to self-representation, the right to counsel of choice protects individual autonomy interests, without regard to the fairness of the proceeding. But the analogy to the right of self-representation does not hold. A defendant's unique right to speak to the court and the jury in his own voice honors his desire to be free from *any* representation. The right is respected even though it usually harms the defense—making clear that it reflects autonomy concerns above trial-fairness interests. The right to counsel of choice, in contrast, expresses only a desire for a particular representative. A defendant who is denied counsel of first choice may still be permitted to choose second-choice counsel. Any infringement of autonomy concerns is thus far less weighty than when self-representation is denied.

Finally, the court of appeals erroneously reasoned that if courts do not automatically reverse convictions when a defendant is denied counsel of choice, it would collapse the right recognized in *Wheat* into the right to effective assistance. Even if a defendant could not obtain reversal when he received effective representation from substitute counsel, it would not eviscerate *Wheat*. Trial courts would still be obligated to respect a defendant's choice of counsel (absent countervailing reasons), and they could be expected to do so in good faith. But, as discussed above, to the extent that *Wheat* is read to relieve a defendant of the need to show deficient performance by substitute counsel, a requirement to show prejudice would avoid the anomalous windfall of automatic reversal when a defendant was represented by a competent, second-choice attorney who did not

employ a materially different strategy from that which the first-choice counsel would have adopted.

ARGUMENT

THE DENIAL OF THE QUALIFIED RIGHT TO BE REPRESENTED BY COUNSEL OF CHOICE DOES NOT WARRANT AUTOMATIC REVERSAL

This Court has made clear that a defendant seeking reversal for an infringement of the right to counsel must ordinarily establish prejudice to the outcome. Absent that showing, the Sixth Amendment is not violated. There is no basis for making an exception to that rule for denial of the qualified right to counsel of choice. A defendant denied the right of first-choice counsel can, and most likely will, receive a fair trial when he proceeds to trial with his second- or third-choice counsel. If the defendant maintains that he was denied a fair trial as a result of the unjustified refusal to allow representation by counsel of choice, he should be required to adduce proof of prejudice.

A. The Right To Counsel Of Choice Is Qualified

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defense." U.S. Const. Amend. VI. "This right, fundamental to our system of justice, is meant to assure fairness in the adversary criminal process." *United States* v. *Morrison*, 449 U.S. 361, 364 (1981). The Sixth Amendment thus encompasses a non-indigent defendant's right to select counsel who will represent him in a criminal prosecution. *Wheat* v. *United States*, 486 U.S. 153, 159 (1988). The right to counsel of choice protects "a defendant's right to determine the type of defense he wishes to present" when a defendant chooses to be rep-

resented by counsel. *United States* v. *Mendoza-Salgado*, 964 F.2d 993, 1014 (10th Cir. 1992).

The Court's decisions establish, however, that the right to counsel of choice lies at the periphery of the Sixth Amendment, not at its core. As the text of the Amendment itself suggests, the "core purpose of the counsel guarantee was to assure 'Assistance' at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor." *United States* v. *Ash*, 413 U.S. 300, 309 (1973); accord *United States* v. *Gouveia*, 467 U.S. 180 (1984); *United States* v. *Cronic*, 466 U.S. 648, 654 (1984); *Powell* v. *Alabama*, 287 U.S. 45, 68-69 (1932). This Court accordingly explained in *Wheat* that, "while the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." 486 U.S. at 159; see also *Morris* v. *Slappy*, 461 U.S. 1, 14 (1983) ("[W]e reject the claim that the Sixth Amendment guarantees a 'meaningful relationship' between an accused and his counsel.").

The right to counsel of one's choice is thus "circumscribed in several important respects." *Wheat*, 486 U.S. at 159. As an initial matter, "a defendant may not insist on representation by an attorney he cannot afford." *Ibid.* The Sixth Amendment "guarantees defendants in criminal cases the right to adequate representation, but those who do not have the means to hire their own lawyers have no cognizable complaint so long as they are adequately represented by attorneys appointed by the courts." *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617, 624 (1989). As respondent observes, "[b]ecause the vast majority of federal defendants are unable to afford privately retained

counsel, and thus are represented by appointed counsel, the right at issue in this case is entirely irrelevant to most criminal cases." Br. in Opp. 13 (citation omitted).

The right to counsel of choice also can be trumped by concerns about, *inter alia*, the fairness of the trial and the administration of justice. *Wheat*, 486 U.S. at 159-164. A criminal defendant who desires representation has no right to choose an advocate who is not a lawyer or who has an "actual conflict" of interest or "a serious potential for [one]." *Id.* at 164. Trial courts are accordingly given wide latitude to deny a defendant his first choice counsel when consistent "with the ethical and orderly administration of justice." *United States* v. *Diozzi*, 807 F.2d 10, 12 (1st Cir. 1986).

B. A Defendant Who Is Denied His Counsel Of Choice Must Show An Adverse Effect On His Right To A Fair Trial

"[T]he right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *Cronic*, 466 U.S. at 658; *Mickens* v. *Taylor*, 535 U.S. 162, 166 (2002). For that reason, as the Court explained in *Wheat*, "in evaluating Sixth Amendment claims, 'the appropriate inquiry focuses on the adversarial process, not on the accused's relationship with his lawyer as such.'" 486 U.S. at 159 (quoting *Cronic*, 466 U.S. at 657 n.21). This Court's decisions thus make clear that a criminal defendant alleging a Sixth Amendment violation generally must establish that the alleged error deprived him of a fair trial. There is no reason to depart from that principle when the Sixth Amendment claim is that a defendant was unjustifiably denied his right to counsel of choice.

1. The Sixth Amendment is not violated absent an adverse effect on the trial process

In *Strickland* v. *Washington*, 466 U.S. 668, 687 (1984), this Court held that a criminal defendant alleging that his counsel provided ineffective assistance must establish not only that "counsel's performance was deficient," but also that counsel's "deficient performance prejudiced the defense." The Court explained that "[u]nless a defendant makes both showings, it cannot be said that the conviction * * * resulted from a breakdown in the adversary process that renders the result unreliable." *Ibid.*

Strickland's requirement that a defendant demonstrate prejudice to establish a Sixth Amendment violation implemented the basic principle that "[a]bsent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated." *Cronic*, 466 U.S. at 658; see also *Morrison*, 449 U.S. at 365 ("The premise of our prior cases is that the constitutional infringement identified has had or threatens some adverse effect upon the effectiveness of counsel's representation or has produced some other prejudice to the defense."). Thus, "defects in assistance that have no probable effect upon the trial's outcome do not establish a constitutional violation." *Mickens*, 535 U.S. at 166.

If a defendant alleging a violation of the fundamental Sixth Amendment right to effective assistance of counsel must establish that his counsel's deficient performance had a "probable effect upon the trial's outcome," *Mickens*, 535 U.S. at 166; see *Strickland*, 466 U.S. at 693-694, then a defendant alleging a denial of the subsidiary right to counsel of choice must also show some effect on the reliability of his trial in order to establish a violation of the Sixth Amendment. All violations of the Sixth Amendment must be

linked to the purpose of that right, *i.e.*, to "ensure a fair trial." *Strickland*, 466 U.S. at 686. A trial court's unjustified refusal to allow representation by choice of counsel—thereby leaving the defendant with representation by second-choice counsel—does not complete a violation of the Sixth Amendment without further proof of an adverse effect on the defendant's right to receive a fair trial.

2. A defendant has the burden to show prejudice from the denial of the right to counsel of choice

It is difficult to say that a trial is "unfair" when an accused is represented by his second-choice counsel, that counsel performs effectively, and the government's case has been tested by "partisan advocacy," thereby serving "the ultimate objective [of the Sixth Amendment] that the guilty be convicted and the innocent go free." *Cronic*, 466 U.S. at 655 (citation omitted). In those instances in which counsel of choice is improperly denied, with the result that the defendant proceeded to trial with his second-choice counsel, requiring proof of *that* counsel's ineffectiveness would be consistent with this Court's recognition that the Sixth Amendment right to the assistance of counsel "has been accorded[] * * * not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *Mickens*, 535 U.S. at 166 (internal quotation marks and citation omitted).

To the extent that *Wheat* is read as requiring a different showing of deficiency than is required in a typical ineffectiveness case, it would not justify dispensing with *any* showing of prejudice. Even if *Wheat* is read to relieve a defendant of the burden to show that his substitute counsel rendered deficient performance under the first prong of the *Strickland* test, it would still make sense to require the defendant to show that his counsel of choice would have

pursued a different defense strategy that would have created a "reasonable probability that * * * the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Under that approach, a defendant may prove prejudice even though the lawyer who represented the defendant at trial rendered effective assistance. For instance, if substitute counsel "is inexperienced, or lacks some specialized knowledge that the defendant's original choice of lawyer had, it may be possible to show that even though his representation of the defendant was not ineffective it was substantially less likely to achieve acquittal." *United States* v. *Santos*, 201 F.3d 953, 960 (7th Cir. 2000). While such an inquiry would have to be carried out with due regard for the always counterfactual and often speculative nature of determinations about how counsel of choice would have in fact conducted the defense, a defendant who can make a sufficiently concrete showing of prejudice could prevail.

A requirement of prejudice not only would respect this Court's "general rule that remedies should be tailored to the injury suffered * * * and should not unnecessarily infringe on competing interests." *Morrison*, 449 U.S. at 364. It would also avoid the oddity of the court of appeals' automatic reversal rule, which gives a preferred status to the *qualified* right to counsel of choice over the *absolute* right to the effective assistance of counsel. The court of appeals decision would require automatic reversal if the defendant's first-choice counsel were improperly disqualified but substitute counsel, were, in fact, a modern-day Clarence Darrow. It would also require automatic reversal if a defendant's second-choice counsel had obtained an acquittal on 19 counts in a 20-count indictment, but could not avoid a conviction on the twentieth count, despite a spirited and professionally admirable fight against an overwhelming government case. Automatic reversal would similarly be required

when the defendant was precluded from retaining one lawyer from a high-powered criminal defense firm but the defendant nonetheless retained several other more experienced members from the same firm. Those anomalies reveal that an automatic reversal rule cannot be reconciled with the principle that the Sixth Amendment's essential aim is to guarantee the defendant a fair trial.

3. A presumption of prejudice is not warranted

There is no basis for concluding that the denial of the right to counsel of choice qualifies as an exceptional Sixth Amendment error where prejudice is presumed. This Court has presumed prejudice only in narrowly defined Sixth Amendment contexts when necessary to ensure that the defendant received a fair trial. *Strickland*, 466 U.S. at 692. This Court has not required any showing of prejudice "where assistance of counsel has been denied entirely or during a critical stage of the proceeding," *Mickens*, 535 U.S. at 166, or where the government has interfered with counsel's ability to represent the defendant at a critical stage of the proceeding. *Strickland*, 466 U.S. at 692 ("Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice."); *Cronic*, 466 U.S. at 658-660; *Gideon* v. *Wainwright*, 372 U.S. 335, 344-345 (1963).[3] Prejudice is also presumed when counsel

[3] Thus, the Court has found constitutional error without any showing of prejudice where the defendant was denied counsel at trial (*Johnson* v. *Zerbst*, 304 U.S. 458, 467-468 (1938)); at arraignment (*Hamilton* v. *Alabama*, 368 U.S. 52, 53-54 (1961)); or at a preliminary hearing (*White* v. *Maryland*, 373 U.S. 59, 60 (1963) (per curiam). The Court similarly has not required a showing of prejudice when the government "interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense." *Strickland*, 466 U.S. at 686 (citing *e.g.*, *Geders* v. *United States*, 425 U.S. 80 (1976) (bar on attorney-client consultation during overnight recess); *Herring*

is forced to engage in joint representation of co-defendants over counsel's objection, unless the court determines that there is no conflict. *Holloway* v. *Arkansas*, 435 U.S. 475 (1978). When "'circumstances of that magnitude'" have occurred, "the likelihood that the verdict is unreliable is so high that a case-by-case inquiry is unnecessary." *Mickens*, 535 U.S. at 166 (quoting *Cronic*, 466 U.S. at 659 n.26); *Strickland*, 466 U.S. at 692 ("Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost."); accord *Bell* v. *Cone*, 535 U.S. 685, 695 (2002); *Cronic*, 466 U.S. at 658-659.

The Court has also applied a "limited[ ] presumption of prejudice" when counsel labors under an actual conflict of interest stemming from representation of multiple defendants but counsel makes no objection. *Strickland*, 466 U.S. at 692. In such an instance, prejudice is presumed only "if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" *Ibid.* (quoting *Cuyler* v. *Sullivan*, 446 U.S. 335, 348, 350 (1980)); *Mickens*, 535 U.S. at 168. As with other cases where prejudice is presumed, representation by counsel who is laboring under a conflict created by the representation of multiple defendants creates a high probability of prejudice that is difficult to prove. *Id.* at 175; *Strickland*, 466 U.S. at 692.

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v. *New York*, 422 U.S. 853 (1975) (bar on summation at bench trial); *Brooks* v. *Tennessee*, 406 U.S. 605, 612-613 (1972) (requirement that defendant be first defense witness); *Ferguson* v. *Georgia*, 365 U.S. 570, 593-596 (1961) (bar on direct examination of defendant)); see also *Cronic*, 466 U.S. at 660-661 (describing appointment of counsel on the day of capital trial in *Powell* v. *Alabama*, 287 U.S. 45 (1932)). The Court has also indicated that the constructive denial of counsel occurs if counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing." *Id.* at 659.

The above considerations cannot be said of a trial court's erroneous refusal to permit the defendant to be represented by counsel of his first choice. Here, for example, respondent was not deprived of the right to be represented by counsel, but only the right to be represented by a particular out-of-state lawyer, Low. And although the trial court erroneously denied the *pro hac vice* motion of Low, the trial court permitted counsel picked by respondent's family to withdraw and respondent was permitted to retain attorney Dickhaus, who respondent selected upon the recommendation of Low. Those circumstances simply do not equate with the denial of counsel altogether.[4]

Nor is the denial of the right to counsel of choice one of those "situations in which the conviction will reasonably not be regarded as fundamentally fair" because the error is inherently prejudicial. *Mickens*, 535 U.S. at 167 n.1. Even assuming that "[a] defendant's right to the counsel of his choice includes the right to have an out-of-state lawyer admitted *pro hac vice*," *United States* v. *Walters*, 309 F.3d 589 (9th Cir. 2002) (internal quotation marks and citation omitted), cert. denied, 540 U.S. 846 (2003), it is hard to see why requiring a defendant to choose in-state counsel inherently

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[4] Respondent states (Br. in Opp. 8) that he "never chose" Dickhaus to represent him. In fact, in May 2003, respondent retained Dickhaus "as his local counsel to assist Mr. Low in the trial of this matter and to handle motion hearings, filings and other local responsibilities." Resp. C.A. Br. 15. Moreover, although the court repeatedly advised respondent before his trial in July 2003 that Low would not be admitted *pro hac vice*, respondent did not seek a continuance to retain another lawyer (in-state or out-of state) to replace Dickhaus. Pet. App. 3a-4a (describing revocation of Low's provisional entry on March 4, 2003, during evidentiary hearing and denial of *pro hac vice* application on March 18, 2003, and again in April 2003). Respondent has also informed the district court that he wants Dickhaus to assist Low in the event of a retrial. 09/01/05 Tr. 7.

prevents the defendant from receiving a fair trial. See, *e.g.*, *id.* at 593 (concluding that representation by in-state counsel during sentencing did not adversely affect outcome at sentencing). There is almost always going to be a pool of highly qualified lawyers available to step in as retained counsel if first-choice counsel is removed. The denial of counsel of choice is thus not so likely to have an adverse effect on the defense so as to render a prejudice inquiry unnecessary. Quite the contrary, the denial of counsel of choice could at times result in the defendant's receiving *more* effective representation. *Mickens*, 535 U.S. at 169 n.2 (characterizing the decision "to retain a particular lawyer" as "often uninformed") (quoting *Cuyler*, 446 U.S. at 344).

In this case, there is no inherent likelihood that the verdict was rendered unreliable by the mere fact that respondent was represented by counsel who was not his first choice. Respondent had the opportunity to retain other counsel, and he has not argued that his actual counsel rendered ineffective assistance at trial. Under those circumstances, there is no justification for presuming prejudice.[5]

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[5] The court of appeals observed that "nearly all the circuits to address this issue" have applied a rule of automatic reversal. Pet. App. 15a; accord Br. in Opp. 6. Those decisions, however, do not offer unqualified support for dispensing with a prejudice requirement. The Third Circuit has suggested that a prejudice inquiry "might" be proper if the denial of counsel of choice is "erroneous" but not "arbitrary." *United States* v. *Voigt*, 89 F.3d 1050, 1074, cert. denied, 519 U.S. 1047 (1996). The Ninth Circuit in *Walters*, *supra*, reviewed for harmlessness when the denial occurred at sentencing. Other courts have held that in denying a defendant's request to substitute counsel shortly before or during trial, courts may consider whether the defendant is represented by able counsel and whether the denial would prejudice the defense. *Mendoza-Salgado*, 964 F.2d at 1015; *Wilson* v. *Mintzes*, 761 F.2d 275, 281 (6th Cir. 1985). If a trial court may consider the *absence* of prejudice in denying a defendant his preferred counsel, it makes no

4. The Seventh Circuit's "adverse effect" standard properly recognizes that automatic reversal is unwarranted, but places too little burden on the defendant to show prejudice

In rejecting a rule that the denial of counsel of choice results in automatic reversal, the Seventh Circuit has adopted an "adverse-effect" standard that requires a defendant to show "an identifiable difference in the quality of representation between the disqualified counsel and the attorney who represents the defendant at trial," but not a difference so great as "to undermine confidence in the outcome." *Rodriguez* v. *Chandler*, 382 F.3d 670, 675 (2004), cert. denied, 125 S. Ct. 1303 (2005). The court of appeals described that rule as a "middle-ground" approach. Pet. App. 16a. Because that approach at least requires some showing of an adverse effect on the defense from the denial of counsel of choice, the Seventh Circuit's approach is far superior to the automatic reversal rule embraced by the decision below.

Yet there are compelling reasons to reject the Seventh Circuit's "adverse-effect" standard. First, the court in *Rodriguez* reasoned that "[l]osing the services of one's pre-

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sense to *presume* that prejudice accompanies every denial of first-choice counsel. Finally, the First Circuit has said that its previous decision in *United States* v. *Panzardi Alvarez*, 816 F.2d 813, 817 (1987), "predates much of the Supreme Court's recent reshaping of harmless error doctrine." *Young* v. *City of Providence*, 404 F.3d 4, 24 n.14 (2005) (declining to adopt a rule of automatic reversal in the civil context). The decisions cited by the court of appeals all pre-date *Mickens*, *supra*, and *Neder*, 527 U.S. at 8-9 (pp. 25-26, *infra*), both of which emphasized that claims subject to an automatic reversal rule are the rare exception. See also *Fuller* v. *Diesslin*, 868 F.2d 604, 609 (3d Cir.) ("It is by no means clear * * * whether [the circuit's automatic reversal rule] survives *Strickland* or the burgeoning constitutional harmless error cases."), cert. denied, 493 U.S. 873 (1989).

ferred lawyer can be similar to receiving the services of a lawyer with a concealed conflict: in either situation trial counsel may well do just fine, but there may be hard-to-uncover shortcomings." 382 F.3d at 675. The Seventh Circuit thus believed that representation by a conflicted attorney "seems the closest match" to a denial of counsel of choice. *Ibid.* This Court in *Mickens*, 535 U.S. at 175, however, strongly suggested that dispensing with *Strickland's* prejudice inquiry in conflict cases is confined to those situations where counsel is conflicted by *multiple representation* of co-defendants because "[n]ot all attorney conflicts present comparable difficulties." If not all conflicts pose identical risks to adequacy of performance, there is surely no basis for equating constitutionally competent second-choice counsel with the most serious type of conflict of interest.

Second, a limited presumption of prejudice when a defendant is represented by a conflicted attorney may be appropriate only because of "the high probability of prejudice" and the "difficulty of proving that prejudice." *Mickens*, 535 U.S. at 175. As discussed, however, there is no basis for inferring a "high probability of prejudice" from the representation by second-choice counsel. Nor is respondent correct that it may be "impossible to discern after the fact" the impact on the trial resulting from different "strategic and tactical choices" that would have been taken by first-choice counsel and those taken by second-choice counsel. Br. in Opp. 17. District courts applying *Strickland* on collateral review of convictions routinely examine counsel's performance at trial and draw inferences about how superior performance of a particular function would have affected the jury's verdict. See *Massaro* v. *United States*, 538 U.S. 500, 505 (2003) (courts "may take testimony from witnesses for the defendant and the prosecution and from the counsel alleged to have rendered the deficient perfor-

mance" in order "to ascertain whether the alleged error was prejudicial"). An analogous inquiry could be made to determine the impact of any different tactics or strategies that first-choice counsel would have pursued.[6]

Like the case when a defendant claims that he was denied the effective assistance of counsel, a court reviewing a claim that a defendant was denied his first-choice counsel can assess the performance of the second-choice counsel and determine whether representation by the preferred counsel would have had "a probable effect upon the trial's outcome." *Mickens*, 535 U.S. at 166; *Strickland*, 466 U.S. at 693-694. That examination already has been undertaken by at least one lower court reviewing claims of a denial of the right to counsel of choice. See *Walters*, 309 F.3d at 593 (concluding that erroneous denial of *pro hac vice* motion of counsel for sentencing was harmless because the defendant "was well-represented at sentencing" and successfully obtained a reduction in sentence over that recommended by government).

The fact that defendants in many instances may be unable to show prejudice from representation by second-choice counsel does not mean that prejudice was likely present but hard to uncover. Rather, the far more natural inference to be drawn is that prejudice is likely absent be-

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[6] In *Massaro*, 538 U.S. at 505-506, this Court held that ineffective-assistance-of-counsel claims are more appropriately resolved on collateral review than on direct appeal so that a factual record may be developed for assessing counsel's performance and the issue of prejudice, and to avoid creating perverse incentives for counsel on direct appeal to claim that counsel was ineffective, regardless of the merits of the claim. Similar considerations justify a preference for litigating claims of improper denial of counsel of choice on collateral proceedings rather than on direct appeal, so that a record can be made on disqualified counsel's strategic plan and the probable impact on the trial.

cause defendants denied their first-choice counsel generally will have picked, as their second choice, counsel who faithfully carried out the defendant's desires and mounted a vigorous defense. Thus, it would be "odd to reserve the most drastic remedy for those situations where there has been no discernable injury or other impact." *Morrison*, 449 U.S. at 366 n.2; *Rodriguez*, 382 F.3d at 674 ("it would make little sense to say that the less harm a mistake causes the more readily the appellate court must set aside the judgment").

C. The Court Of Appeals Erred In Holding That An Erroneous Denial Of Counsel Of Choice Reflects A Defect In The Trial Mechanism And Defies Harmless-Error Analysis

The court of appeals held that the denial of counsel of choice implicates a defect in the "framework of the trial mechanism" and is not amenable to review for harmlessness. Pet. App. 17a-20a. That conclusion not only departs from normal Sixth Amendment principles requiring a defendant to show that the alleged infringement of the right to counsel prejudiced the outcome of the trial, as explained above. The reasoning of the court of appeals also is unsound on its own terms.

1. The qualified right to counsel of choice is not so fundamental to our system of justice that its impairment mandates automatic reversal

The Court has identified a narrow class of fundamental constitutional errors as being so intrinsically harmful that they require the reversal of a defendant's conviction without inquiry into whether the errors had an effect on the outcome of the case. The few errors found to rise to that level have been said to "infect the entire trial process," *Brecht* v. *Abrahamson*, 507 U.S. 619, 630 (1993), "necessarily render a trial fundamentally unfair," *Rose* v. *Clark*, 478

U.S. 570, 577 (1986), and affect "[t]he entire conduct of the trial from beginning to end" and "the framework within which the trial proceeds," *Fulminante*, 499 U.S. at 309, 310. In *Johnson* v. *United States*, 520 U.S. 461, 468-469 (1997), and *Neder*, 527 U.S. at 8, this Court listed six examples of such errors: (1) a biased trial judge, see *Tumey* v. *Ohio*, 273 U.S. 510 (1927); (2) the complete denial of counsel, see *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); (3) the denial of self-representation at trial, see *McKaskle* v. *Wiggins*, 465 U.S. 168 (1984); (4) the denial of a public trial, see *Waller* v. *Georgia*, 467 U.S. 39 (1984); (5) racial discrimination in the selection of a grand jury, see *Vasquez* v. *Hillery*, 474 U.S. 254 (1986); and (6) the giving of a defective reasonable-doubt instruction, see *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993). As explained in *Neder*, such errors "deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence.'" 527 U.S. at 8-9 (quoting *Rose*, 478 U.S. at 577-578).

The court of appeals' conclusion that a denial of right to counsel of choice rises to that level is inconsistent with the nature of the right. The trial court's considerable leeway to limit a defendant's choice of counsel itself indicates that the right carries limited weight in protecting the integrity of the trial process. As Judge Posner has explained, "[t]hat a district judge has a broad discretion to extinguish the right to counsel of one's choice for reasons of calendar control suggests that this right, which in any event no indigent criminal defendant has, is, like the right to effective assistance of counsel (a right whose vindication requires proof of prejudice), not so fundamental as the rights protected by the rule of automatic reversal." *Santos*, 201 F.3d at 960 (citations omitted).

Judge Easterbrook has similarly noted the oddity of applying an automatic reversal rule when defendants who complain of incompetent counsel must show prejudice: "It is hard to see why violations of the qualified right to counsel of choice should lead to automatic reversal, when deprivation of the absolute right to a competent attorney leads to relief only if prejudice is demonstrable." *Rodriguez*, 382 F.3d at 674. "A defendant with an inept attorney is in a more precarious position than one with a competent lawyer who is the defendant's second or third choice." *Ibid.* It follows that a defendant who has been deprived of counsel of choice should not be relieved of any showing that the deprivation affected the outcome.

Similarly, "[u]nlike such defects as the complete deprivation of counsel or trial before a biased judge," the exclusion of a defendant's first-choice counsel "does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Neder*, 527 U.S. at 9. There is no inherent reason why second-choice counsel cannot put up just as a robust defense, and be just as faithful to his client's wishes, as first-choice (but disqualified) counsel would have been.

2. The court of appeals' reasoning is flawed

The court of appeals offered three justifications for its conclusion that the denial of the right to counsel of choice merits automatic reversal, none of which withstands scrutiny.

a. First, the court held that the district court's error could not be assessed for prejudice because it did not "take[] place during the presentation of evidence to the jury," Pet. App. 16a (internal quotation marks omitted) (citing *Neder*, *supra*), but rather "infect[ed] the entire trial process from beginning to end," *id.* at 18a (internal quota-

tion marks omitted). It is undoubtedly true that the deprivation of counsel of choice cannot be temporally confined to a particular moment during the trial, but the same is true of other, more fundamental Sixth Amendment claims to which the rule of automatic reversal does not apply. As discussed above, in *Strickland*, 466 U.S. at 693-694, this Court held that a defendant whose counsel performs deficiently—a problem that may pervade the entire trial—must establish that such performance prejudiced him.

Similarly, in *Mickens*, 535 U.S. at 172-175, this Court held that a defendant alleging that his counsel labored under a conflict of interest relating to a former client must show at the very least that the conflict adversely affected counsel's performance. *Cuyler*, 446 U.S. at 350 (defendant alleging that counsel who represented him and other co-defendants at separate trials and who did not object to the multiple representation must establish that the conflict had an adverse effect on counsel's performance). Thus, the mere fact that the denial of counsel of choice spans the entire trial is an insufficient basis for applying automatic reversal.

b. The court of appeals' second justification is no less contrary to this Court's Sixth Amendment jurisprudence. The court of appeals reasoned that the right to counsel of choice is akin to the right to self-representation, the wrongful denial of which is subject to automatic reversal. See *McKaskle*, 465 U.S. at 177 n.8. The court explained that "[b]oth rights 'reflect[] constitutional protection of the defendant's free choice independent of concern for the objective fairness of the proceeding.'" Pet. App. 18a-19a (quoting *Flanagan*, 465 U.S. at 268). That analogy is flawed.[7]

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[7] The court of appeals' apparent reliance on *Flanagan* is also flawed. *Flanagan* did not state that the rights to self-representation and to

The Sixth Amendment "grants to the accused personally the right to make his defense," *Faretta* v. *California*, 422 U.S. 806, 819 (1975), in order to "affirm the dignity and autonomy of the accused," *McKaskle*, 465 U.S. at 176-177. It follows that the violation of the right to self-representation is subject to automatic reversal, because the harm to personal autonomy that the denial of the right accomplishes cannot be cured by a reliable jury verdict.

There are several critical distinctions, however, between the right to self-representation, *i.e.*, to be represented by *no* counsel at all, and the right to be represented by one's particular first-choice lawyer when the defendant makes the threshold decision to be represented by counsel. The right to *self*-representation has a direct and unique link to autonomy that the choice of which lawyer will represent an individual cannot match. Moreover, the right to self-representation "usually increases the likelihood of a trial outcome unfavorable to the defendant," and thus necessarily reflects the primacy of autonomy over fairness. *McKaskle*, 465 U.S. at 177 n.8. By contrast, the right to counsel of choice does not stand above procedural fairness concerns. This Court has emphasized that very distinction, pointing out that "[o]ur holding in *Faretta* * * *, that a criminal defendant has a Sixth Amendment right to represent *himself* if he voluntarily elects to do so, does not encompass the right to choose any advocate if the defendant wishes to be represented by counsel." *Wheat*, 486 U.S. at 159 n.3. To the contrary, concerns about procedural fairness and the effective administration of justice restrict a non-indigent

---

counsel of choice are analogous. The quoted language came from a portion of the Court's opinion in which it *assumed* the two rights were analogous for the purpose of *rejecting* the petitioners' argument that interlocutory review of their pre-trial challenge to the disqualification of their chosen counsel was available. See 465 U.S. at 267-269.

defendant's choice of counsel in significant respects. See pp. 12-13, *supra*. In that respect, respondent's autonomy interests are far weaker than that of a defendant electing self-representation.

The differences in the two rights are also confirmed by the different sources of the rights and correspondingly distinct nature of any infringement. The right to self-representation derives not from the Assistance of Counsel Clause of the Sixth Amendment as such, but more broadly from this country's history, the structure of the Sixth Amendment *as a whole*, and notions of respect for individual autonomy. *Faretta*, 422 U.S. at 812-834; accord *Martinez* v. *Court of Appeal*, 528 U.S. 152, 156 (2000). Based on those principles, "a State may [not] constitutionally hale a person into its criminal courts and there *force a lawyer upon him*." *Faretta*, 422 U.S. at 807 (emphasis added). Thus, the defendant's "specific rights to make *his* voice heard * * * form the core of a defendant's right of self-representation." *McKaskle*, 465 U.S. at 177 (emphasis added).

A defendant who is denied his right to self-representation is in a critically different position from a defendant who wishes to have counsel speak on his behalf and who in fact selects his own counsel (albeit not his first choice) to represent him. In this case, for example, respondent was not deprived of the right to choose whether to be represented by counsel; the only deprivation at issue was the right to be represented by his first-choice counsel. Because respondent was represented by counsel selected by himself rather than the State, any deprivation of autonomy is not nearly as significant as in the case of a defendant who wishes to represent himself but is nonetheless forced to be represented by counsel who is generally selected by the court.

In short, a defendant denied the right to counsel of choice suffers a significantly weaker deprivation of choice,

autonomy, and the right to control one's defense. The differences are even more extreme in the case of a defendant who wishes to retain *a team* of counsel but the court arbitrarily refuses to permit representation by one member of the team. Cf. *United States* v. *Voigt*, 89 F.3d 1050, 1071 (3d Cir.) (defendant claimed court arbitrarily disqualified third attorney sought to be added to defense team but court found no abuse of discretion), cert. denied, 519 U.S. 1047 (1996). Autonomy concerns in the counsel-of-choice context thus should receive minimal weight in determining whether an erroneous deprivation should automatically invalidate a conviction.

c. The court of appeals finally reasoned that a rule of automatic reversal is necessary to prevent "collapsing the right to counsel of choice into the right to receive effective assistance of counsel," and thereby "obliterat[ing] the criminal defendant's Sixth Amendment right to be represented by counsel of his choice, a right the Supreme Court recognized in *Wheat*." Pet. App. 20a (internal quotation marks omitted). That is incorrect. The right to counsel of choice would not be "obliterated" even if a defendant could not obtain relief on appeal without establishing that substitute counsel was ineffective. Trial courts would still be under a Sixth Amendment obligation to apply a "presumption in favor of [a defendant's] counsel of choice," *Wheat*, 486 U.S. at 164, and those courts could be expected to carry out that responsibility conscientiously and in good faith. Cf. *Mickens*, 535 U.S. at 173 (rejecting automatic reversal as a sanction "to induce * * * trial judges to follow the law" on conflicts of interest).

In any event, separate protection can be afforded to a defendant who is improperly denied counsel of choice without imposing the extreme remedy of automatic reversal. As discussed, such a defendant could be afforded relief without

showing that counsel's performance fell below an objective standard of reasonableness under the first prong of *Strickland*, where the defendant can nevertheless show that "there is a reasonable probability" that but for the denial, "the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Under that requirement, a defendant who is represented by competent second-choice counsel may attempt to show that the absence of his preferred counsel resulted in prejudice. See pp. 15-16, *supra*. Such a rule would bring the denial of the right to counsel of choice in line with the remainder of this Court's Sixth Amendment jurisprudence and would not impose unjustified costs on victims, witnesses, courts, and the public that result from the reversal of a criminal conviction. *United States* v. *Mechanik*, 475 U.S. 66, 72 (1986).

CONCLUSION

The judgment of the Eighth Circuit should be reversed.

Respectfully submitted.

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FEBRUARY 2006

Supreme Court, U.S.
FILED
MAR 2 0 2006
OFFICE OF THE CLERK

(9)

No. 05-352

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

CUAUHTEMOC GONZALEZ-LOPEZ

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED: SEPT. 16, 2005
CERTIORARI GRANTED: JAN. 6, 2006

TABLE OF CONTENTS

	Page
United States district court docket entries	1
United States court of appeals docket entries	17
United States Supreme Court docket entries	19
Jury trial transcript (Vol. I)	20
Jury trial transcript (Vol. II)	28

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

No. 4:03-cr-00055-SNL-ALL

UNITED STATES OF AMERICA, PETITIONER

v.

CUAUHTEMOC GONZALEZ-LOPEZ

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
01/08/2003	6	MOTION for Order for Leave to Appear Pro Hac Vice as to defendant Gonzalez-Lopez by John Fahle with Memo to Clerk attached. [4:03-m-7015] (CF) (Entered: 01/10/2003)
		* * * * *
01/09/2003	9	APPEARANCE for defendant Cuauhtemoc Gonzalez-Lopez by Attorney John Fahle [4:03-m-7015] (CF) (Entered: 01/10/2003)
		* * * * *
01/29/2003	16	INDICTMENT (referred to Mag Judge Thomas C. Mummert) by USA; Counts filed

DATE	DOCKET NUMBER	PROCEEDINGS
		against Cuauhtemoc Gonzalez-Lopez (1) count(s) 1, 7, Jorge Alberto Guillen (2) count(s) 1, 2, 7, Rodriquez Woods (3) count(s) 1, 2, 3, 4, 7, Dewayne Welch (4) count(s) 1, 2, 7, Julio Cesar Guillen (5) count(s) 1, 5, 7, Jorge E. Guillen (6) count(s) 1, 5, 7, Ubaldo N. Izaguirre-Carranza (7) count(s) 1, 6, 7, Margarito Antonio Beltran (8) count(s) 1, 7 (SET) (Entered: 01/30/2003)
		* * * * *
03/17/2003	143	MOTION for attorney Joseph Low to appear pro hac vice as to defendant Cuauhtemoc Gonzalez-Lopez by Cuauhtemoc Gonzalez-Lopez (BAK) (Entered: 03/18/2003)
		* * * * *
03/18/2003	148	RULED DOCUMENT by Honorable Jean C. Hamilton denying motion for attorney Joseph Low to appear pro

DATE	DOCKET NUMBER	PROCEEDINGS
		hac vice as defendant Cuauhtemoc Gonzalez-Lopez [143-1] (cc: all counsel, USPT, USP, USM) (BAK) (Entered: 03/19/2003)
		* * * * *
04/14/2003	177	MOTION for attorney Joseph Hawkins to appear pro hac vice as to defendant Gonzalez-Lopez by Cuauhtemoc Gonzalez-Lopez (CEL) (Entered: 04/14/2003)
04/14/2003	178	RULED DOCUMENT by Honorable Jean C. Hamilton denying motion for attorney Joseph Hawkins to appear pro hac vice as to defendant Gonzalez-Lopez [177-1] (cc: all counsel, USPT, USP, USM) (CEL) (Entered: 04/14/2003)
04/14/2003	179	MOTION for attorney substitution as to defendant Gonzalez-Lopez re: Joseph Low to replace Kurt Wolfgram and John Fahle by Cuauhtemoc Gonzalez-Lopez (CEL) (Entered: 04/14/2003)

DATE	DOCKET NUMBER	PROCEEDINGS
04/14/2003	180	RULED DOCUMENT by Honorable Jean C. Hamilton denying motion for attorney substitution as to defendant Gonzalez-Lopez re: Joseph Low to replace Kurt Wolfgram and John Fahle [179-1] (cc: all counsel, USPT, USP, USM) (CEL) (Entered: 04/14/2003)
		* * * * *
04/25/2003	183	MOTION to continue as to defendant Gonzalez-Lopez, to withdraw attorney , and for order show cause hearing by Cuauhtemoc Gonzalez-Lopez (CEL) (Entered: 04/28/2003)
		* * * * *
04/25/2003	185	MINUTES: before Honorable Jean C. Hamilton re [183-1], re [183-2], re [183-3] as to defendant Gonzalez-Lopez: Parites present for motion to withdraw as counsel; deft pro se granted until

DATE	DOCKET NUMBER	PROCEEDINGS
		5/5/03 to retain new counsel; Counsel must file entry of appearance by 5/5/03; ruling on the motion to withdraw held in abeyance; Speedy trial waived only to 7/7/03 to cover pre time for new atty; Interpreter: Juan Morales Defendant Location: custody court reporter: Shannon McCreary; proceedings started: 10:00am - ended: 10:25am (CEL) (Entered: 04/28/2003)
		* * * * *
04/30/2003	187	LETTER from USCA re: petition for writ of mandamus filed by atty Low on behalf of deft. Gonzalez-Lopez (CEL) (Entered: 05/01/2003)
		* * * * *
05/02/2003	188	APPEARANCE for defendant Cuauhtemoc Gonzalez-Lopez by Attorney Karl W. Dickhaus (CEL) (Entered: 05/06/2003)

DATE	DOCKET NUMBER	PROCEEDINGS
05/08/2003	189	ORDER as to defendant Gonzalez-Lopez by Honorable Jean C. Hamilton re [183-1], re [183-2], ORDERED that atty Fahle's motion for hearing to show cause why Joseph Low should not be subject to sanctions by this court for interfering with atty/client relationship is set for 5/20/03 at 10:00am. FURTHER ORDERED that deft Gonzalez-Lopez shall be present at the hearing. FURTHER ORDERED that the Clerk is directed to service notice of the hearing on attys of record, John Fahle and Joseph Hawkins Low IV. [183-3] ; in-court hearing set for 10:00 5/20/03 for Cuauhtemoc Gonzalez-Lopez (cc: all counsel, USPT, USP, USM and attys Fahle and Low) (CEL) (Entered: 05/08/2003)

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
05/08/2003	190	ORDER as to defendant Gonzalez-Lopez by Honorable Jean C. Hamilton granting motion to continue as to defendant Gonzalez-Lopez [183-1], granting motion to withdraw attorney [183-2] withdrawing attorney John Fahle for Cuauhtemoc Gonzalez-Lopez; jury trial set for 9:00 7/7/03 for Cuauhtemoc Gonzalez-Lopez (cc: all counsel, USPT, USP, USM) (CEL) (Entered: 05/08/2003)
05/12/2003		APPEAL Order from USCA USCA number: 03-2109 as to defendant: Gonzalez-Lopez The petition for writ of mandamus, and the motion for stay contained within it, are denied. (CEL) (Entered: 05/14/2003)
	* * * * *	
06/03/2003	204	MEMORANDUM, Opinion and Order: by Honorable Jean C. Hamilton denying motion to strike atty John

DATE	DOCKET NUMBER	PROCEEDINGS
		Fahle's motion for show cause as to defendant Gonzalez-Lopez and att Low [194-1] FURTHER ORDERED that Mr. Fahle shall file a concise pre-hearing brief discussing the legal basis for his motion by June 11, 2002. Any responses shall be filed by 6/18/03. (cc: all counsel, USPT, USP, USM) (CEL) (Entered: 06/04/2003)
		* * * * *
06/30/2003	247	ORDER by Honorable Jean C. Hamilton re [221-1] ORDERED that this case is set for hearing on 7/22/03 at 9:30 in the courtroom of the undersigned regarding the motions for sanctions by atty Stobbs; in-court hearing set for 9:00 2/7/03 (cc: all counsel, USPT, USP, USM) (CEL) (Entered: 07/01/2003)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
07/03/2003	259	MINUTES: before Honorable Jean C. Hamilton denying motion to continue trial setting as to defendant Gonzalez-Lopez [257-1], denying motion in limine as to defendant Gonzalez-Lopez [256-1], granting motion in limine re: testimony as to defendant: Gonzalez-Lopez [254-1] as to defendant Gonzalez-Lopez; Defendant Location: custody court reporter: Debbie Kriegshauser; proceedings started: 9:30am - ended: 10:00am (CEL) (Entered: 07/03/2003)
		* * * * *
07/07/2003	264	MINUTES: (day 1) before Honorable Jean C. Hamilton jury impaneled as to defendant Gonzalez-Lopez; Govt's evidence commenced but not concluded; Defendant Location: custody court reporter: Patti White; proceedings started: 9:00am - ended: 5:00pm (CEL) (Entered: 07/08/2003)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
07/10/2003	268	MINUTES: (day 4) before Honorable Jean C. Hamilton Parties present for jury trial; Govt's evidence resumed and concluded; Oral motion of deft for judgment of acquittal at close of govt's case made and overruled; deft's evidence commenced and concluded; oral motion of deft for judgment of acquittal at close of all the evidence made and overruled; arguments of counsel made; jury charged and retires to consider its verdict; ordered that alternate jurors be excused; jury returns; verdict of guilty on count 1 returned; on motion of deft, jury polled; sentence deferred to 9/26/03 at 9:00 am; PSI ordered; Probation notified by email of sentencing date; exhibits retained by counsel; Interpreters;

DATE	DOCKET NUMBER	PROCEEDINGS
		Blyelock and Orozco for trial; K. O'Hanlon sworn for use with deft's witness finding Cuauhtemoc Gonzalez-Lopez (1) count(s) 1 guilty; objection to PSR set for 9/22/03 for Cuauhtemoc Gonzalez-Lopez as to defendant Gonzalez-Lopez; Defendant Location: custody court reporter: Patti White; proceedings started: 8:45am - ended: 4:40pm (CEL) (Entered: 07/11/2003)
07/10/2003	269	VERDICT as to Cuauhtemoc Gonzalez-Lopez: guilty as to count 1 (CEL) (Entered: 07/11/2003)
		* * * * *
08/26/2003	303	MEMORANDUM and Order: by Honorable Jean C. Hamilton ORDERED that John Fahle's motion for continuance, motion to withdraw and motion for show cause hearing a/k/a motion for sanctions is Granted. FURTHER ORDERED that

DATE	DOCKET NUMBER	PROCEEDINGS
		Joseph H. Low, IV shall pay John Fahle's atty's fees, expenses and costs associated with his motion for continuance, motion to withdraw and motion for show cause hearing a/k/a motion for sanctions filed 4/25/03. FURTHER ORDERED that the clerk of court shall forward a copy of this memo and order to the Office of Reportable Actions, Satte Bar of California, 1149 South Hill Street, Los Angeles, CA 90015-2299. re [183-1], re [183-2], [183-3] (cc: all counsel, USPT, USP, USM and Office of Reportable Actions and Joseph Low) (CEL) Modified on 08/27/2003 (Entered: 08/26/2003)
		* * * * *
09/26/2003	323	JUDGMENT by Honorable Jean C. Hamilton as to Cuauhtemoc Gonzalez-Lopez sentencing Cuauhtemoc Gonzalez-Lopez (1) count(s) 1. Deft. was found

DATE	DOCKET NUMBER	PROCEEDINGS
		guilty of count 1; Imprisonment for term of 292 months deft remanded; Supervised release for term of 4 years; special assessment of $100.00 due immediately., dismissing counts as to Cuauhtemoc Gonzalez-Lopez (1) count(s) 7. count 7 forfeiture , case terminated (cc: all counsel, USPT, USP, USM) (CEL) (Entered: 09/29/2003)
		* * * * *
09/14/2005	406	ORDER as to Cuauhtemoc Gonzalez-Lopez; IT IS THEREFORE ORDERED that defendant's motion to dismiss 398 is DENIED for the reasons set out herein; IT IS FURTHER ORDERED that the motion of counsel Joseph H. Low IV for leave to appear pro hac vice as counsel for defendant to represent him in this case is GRANTED; IT IS FURTHER ORDERED that this case is

DATE	DOCKET NUMBER	PROCEEDINGS
		RESET for trial October 17, 2005; IT IS FINALLY ORDERED that the findings and rulings herein shall take precedence over any other order issued by this Court which may be in conflict with this order; Jury Trial set for 10/17/2005 09:30 AM in Courtroom 3N before Honorable Stephen N. Limbaugh; Signed by Judge Stephen N. Limbaugh on 09/14/2005; (DJO) (Entered: 09/14/2005)
		* * * * *
09/20/2005	407	Second MOTION for Speedy Trial Findings and Continuance by USA as to defendant Cuauhtemoc Gonzalez-Lopez, Jorge Alberto Guillen, Rodriquez Woods, Dewayne Welch, Julio Cesar Guillen, Jorge E. Guillen, Ubaldo N. Izaguirre-Carranza, Margarito Antonio

DATE	DOCKET NUMBER	PROCEEDINGS
		Beltran. (Attachments: # 1 # 2 # 3 # 4 # 5) (Becker, Tiffany) (Entered: 09/20/2005)
		* * * * *
10/06/2005	411	ORDER TO CONTINUE - IT IS THEREFORE ORDERED that the Government's request for a continuance is GRANTED and this case is REMOVED from the trial docket of October 17, 2005. IT IS FURTHER ORDERED that counsel for the Government shall notify this Court immediately when the United States Supreme Court has ruled on its Petition for Certiorari. If the Petition is denied, the Court will confer with counsel and set the case for a jury trial at the earliest convenient time for the defendant and

DATE	DOCKET NUMBER	PROCEEDINGS
		counsel. (per 18:3161) - Ends of Justice as to Cuauhtemoc Gonzalez-Lopez. Signed by Judge Stephen N. Limbaugh on 10/06/05. (ARL) (Entered: 10/06/2005)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 03-3487

UNITED STATES OF AMERICA

v.

CUAUHTEMOC GONZALEZ-LOPEZ

DOCKET ENTRIES

DATE	PROCEEDINGS AND ORDERS
3/8/05	THE COURT: Roger L. Wollman, Richard S. Arnold, Kermit E. Bye. OPINION FILED by Kermit E. Bye, Authoring Judge. PUBLISHED. [03-3487] [1875927] (dmh) [03-3487]
3/8/05	JUDGMENT: Roger L. Wollman, Richard S. Arnold, Kermit E. Bye. The judgment of the lower court is REVERSED and REMANDED in accordance with the opinion. [03-3487] [1875929] (dmh) [03-3487]
	* * * * *
5/19/05	JUDGE ORDER: denying petition for panel rehearing [1894354-1] and petition for rehearing with petition for rehearing en banc [1893609-1] filed by USA. [03-3487] [1904707] - Published Order. (dmh) [03-3487]

UNITED STATES SUPREME COURT

No. 05-352

UNITED STATES OF AMERICA, PETITIONER

v.

CUAUHTEMOC GONZALEZ-LOPEZ

DOCKET ENTRIES

DATE	PROCEEDINGS AND ORDERS
Jul 29 2005	Application (05A112) to extend the time to file a petition for a writ of certiorari from August 17, 2005 to September 16, 2005, submitted to Justice Thomas.
Aug 2 2005	Application (05A112) granted by Justice Thomas extending the time to file until September 16, 2005.
Sep 16 2005	Petition for a writ of certiorari filed. (Response due October 17, 2005)
	* * * * *
Jan 6 2006	Petition GRANTED.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:03CR55JCH

UNITED STATES OF AMERICA, PLAINTIFF

v.

CUAUHTEMOC GONZALEZ-LOPEZ, DEFENDANT

July 7, 2003

Volume I

JURY TRIAL
THE HONORABLE JEAN C. HAMILTON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For Plaintiff: Ms. Tiffany Becker
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[p. 2, line 6]

THE COURT: This is cause No. 4:03CR55, United States versus Gonzalez Lopez. This matter is

here for trial this morning, and the jury panel is downstairs. Before the panel is brought up, I wanted to make a few comments. First of all, we have two interpreters. Could those interpreters stand and be sworn.

JOSE OROZCO and CURTIS BLAYLOCK
were duly sworn to translate English into Spanish and Spanish into English, as follows:

THE COURT: You may be seated. Mr. Low, I notice that you are at counsel table, and I think you need to stay in the back of the courtroom during this trial.

MR. DICKHAUS: Your Honor, we would request that Mr. Low, who is going to assist me at this trial, be allowed to sit just as any other assistants would be allowed to sit at the counsel table.

THE COURT: No, attorneys of record, clients and the agent for the Government, and—

MR. DICKHAUS: We have also requested that our case agent be allowed to sit at table when he arrives, Your Honor.

THE COURT: No, you have the defendant at your table.

MR. DICKHAUS: May we take a few preliminary matters beforehand?

THE COURT: We may.

MR. DICKHAUS: First, we would ask—the defendant would ask, in preservation of his 6th Amendment right, that Mr. Low's application for admission in this case, the denial be reconsidered, in light of the evidence that was presented, specifically

that the testimony of Ms. Van Arink was erroneous, and that the record now establishes conclusively that the allegations therein were false. And that there is no basis for denial of his petition.

We would ask that that be revisited and Mr. Low be admitted pro hac vice for this case.

THE COURT: Ms. Becker.

MS. BECKER: Your Honor, the Government would stand on the Court's record as well as the record made at that motion for sanction hearing.

THE COURT: I'm going to deny the motion. That matter is still under submission, and in due course, that matter will be taken up.

* * * * *

[p. 19, line 25]

THE COURT: Are there any other issues we need to take up before I bring the jury in to seat them, Mr. Dickhaus?

MR. DICKHAUS: If I may obtain some clarification from the Court on this particular issue. I've been informed by the U. S. Marshal Service that Mr. Low is not permitted to have any contact whatsoever with my client, and I'd like to make sure I understand the nature of the Court's order on this so we don't violate it.

THE COURT: I'll be happy to, Mr. Low can be present in the courtroom, as he is now in the back. He is not an attorney of record in this case. He is certainly welcome to visit your client, where he's being held, as would any family member or any other friend, but while we're in the courtroom, the marshals are responsible

for, you know, the security of this courtroom, so those folks who want to be in the courtroom can certainly be outside the well of the Court.

MR. DICKHAUS: I understand, and there's no prohibition against me speaking with Mr. Low, not during the course of proceedings but during recess.

THE COURT: During recesses and the noon hour, that's fine.

MR. DICKHAUS: I just want to make sure, Your Honor, because I don't want to step across the line.

THE COURT: No, I appreciate that. Mr. Low?

MR. LOW: Yes, ma'am, make sure I don't do anything wrong. Does that include I am not allowed to visit with him downstairs in the marshal's office?

THE COURT: That's up to the marshal's regulations and probably not. Usually when he's going to be down here during trial, he will be eating or having lunch, otherwise I suspect during the day, he's going to be up here.

MR. LOW: If he were available downstairs, you don't have a problem with that, okay?

THE COURT: Depending upon whatever the marshal's regulations for allowing visitors to see anyone being held down there and that is up to the Marshal Service.

MR. LOW: Yes, ma'am.

* * * * *

[Ms. Becker:]

[p. 35, line 12]

Officers conducted an interview specifically of Jorge Guillen and you will hear the testimony of Jorge Guillen where he admits to his involvement in the conspiracy, but is unwilling to take the whole responsibility for himself. He indicates to law enforcement officers that he's not the owner of that marijuana. He's not in charge of that marijuana. The defendant, Tomas, who he knew only as Tomas, was the owner of that marijuana, and he agreed to make a recorded telephone call to Tomas to prove that to the law enforcement officials.

Now Jorge Guillen is a Spanish speaker, and task force agent Mike Williams, you will hear testimony, also speaks Spanish and he conducted the interview of Jorge Guillen and arranged for the tape recorded telephone conversation to be made to Tomas, the defendant here in this case.

During that recorded telephone conversation, Jorge Guillen talked to Tomas, indicated that they had not finished the job, and you will hear testimony from Jorge Guillen that the job referred to moving marijuana. That when they would talk about moving marijuana, they would call it the job. They didn't come right out and say move the marijuana.

He indicated that he needed money from Tomas to pay his brothers for their assistance in the courier—carrying of these drugs from place to place and Tomas agreed to meet with Jorge Guillen.

Following that conversation, agent Mike Williams was present for that conversation and heard

Jorge's side of the conversation. He also then listened to the tape of that conversation.

Following that, deciding that Jorge, that they would then set up a controlled pickup of this money that Jorge had requested from Tomas. Tomas directed Jorge to meet him at a location, 7-11 location at Big Bend and Dougherty Ferry in West County, I think in the Valley Park area in 20 minutes, so things are, like I said, moving rapidly. There's a lot going on in this short period of time.

Task Force Agent Mike Williams gets in the Chevy suburban with Jorge Guillen. They arrive at the 7-11. Mike Williams, Agent Mike Williams is hidden in the back of the Chevy suburban but is able to peek out the window and view the meeting between Jorge and Tomas.

Tomas drives up to the location, Jorge gets out of the Suburban and into Tomas' vehicle and Jorge Guillen will tell you at that time Tomas retrieved a package from a compartment area of that vehicle.

Jorge Guillen will tell you that he handed —Tomas handed that package to Jorge. Jorge exchanged some conversation and then got back into the Chevy Suburban and drove away after giving Mike Williams, Agent Mike Williams, the package. That package was a Quaker Oatmeal box and it was heavily taped, but inside was found $9,715 in U.S. currency wrapped in tight plastic with the number 10 on the outside, roughly ten thousand.

* * * * *

[Mr. Dickhaus:]

[p. 44, line 15]

And all the evidence will show is that Mr. Gonzalez Lopez came to that 7-11 and delivered money. The evidence won't show he knew why. The evidence won't show that he had any drugs or guns or anything else at his house. The evidence will show beyond a reasonable doubt, which is not our standard of proof, that he was just a blind mule.

He may or may not have even known what he was doing. He may or may not have even known that it may have been related to some illegal activity. We don't know. We weren't there, and no one will.

* * * * *

[p. 129, line 23]

MR. DICKHAUS: Your Honor, I want to put on the record that when we went down to lunch, the U.S. Marshal's Office is still not allowing Mr. Low access to his client. Despite your admonition that he can see them.

THE COURT: He can see them under whatever rules they are. He is not an attorney of record in this case.

MR. DICKHAUS: I understand.

THE COURT: He may not be under attorney rules, and they've got a problem.

MR. DICKHAUS: I just want to put it on the record that they're declining his ability to see his client.

THE COURT: Well it's his client under his theory of this, but as far as this case goes at this point, Mr. Low is not an attorney of record, so that may make a difference to the marshals.

MR. DICKHAUS: I understand it doesn't change the attorney/client relationship. His ability to practice in this Court, I am in agreement with Your Honor on this, but he's still his attorney and I needed to place that on the record.

THE COURT: That's fine.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:03CR55JCH

UNITED STATES OF AMERICA, PLAINTIFF

v.

CUAUHTEMOC GONZALEZ-LOPEZ, DEFENDANT

July 8, 2003

Volume II

JURY TRIAL
THE HONORABLE JEAN C. HAMILTON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Mr. Dean Hoag
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For Defendant: Mr. Karl Dickhaus
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St. Louis, MO 63144

[p. 2, line 6]

THE COURT: Let the record reflect the jury is not in the courtroom. At this time, I understand there is a matter, Mr. Dickhaus, to take up with the Court.

MR. DICKHAUS: Yes, I did. Thank you, Your Honor. I would like the record to reflect that last night, when we went to the Farmington detention facility to visit Mr. Gonzalez Lopez, that the facility told us that the U.S. Marshal Service had instructed them that I could not bring in Mr. Low, our trial consultant, or any other member of the defense team so that Mr. Gonzalez could meet with us as he had done previously to help assist us in his defense.

And they said that was on a direct order from the marshal's office here, that the supervisor, Christy, I believe is her name, had called them and ordered that these people be not permitted to see Mr. Gonzalez. And that we would make an objection on the record that that's interfering with Mr. Gonzalez's 6th amendment right to participate in his defense and to a fair trial.

THE COURT: Ms. Becker, do you have anything.

MS. BECKER: Your Honor, I have no prior knowledge of that, and we would not have objection to Mr. Low seeing him at Farmington at all.

THE COURT: As I indicated yesterday, I have no objection to Mr. Low, or others, visiting him according to whatever the institution's regulations are and that included the Marshal Service here in the building. If there is a problem, I could talk with the Marshal Service later today to see what the situation is.

MR. DICKHAUS: We would appreciate that, because I understand the marshals have the right to

regulate their facility in this building according to regulations, although I would note also for the record that they have refused to provide us with those regulations. They've just asserted that that's what they now are but I'm assuming, just to be fair to them, that's their policy, that's fine.

But the Farmington facility is not a facility of the U.S. Marshal Service. They have a contract.

THE COURT: They have a contract so I don't know what the situation is so these are still federal prisoners and there may be a situation, I simply don't know.

MR. DICKHAUS: I understand and I would appreciate if Your Honor would ask the Marshal Service to clarify that for us.

THE COURT: Okay. All right. Anything else before we bring the jury in?

* * * * *

[p. 123, line 5]

THE COURT: Let the record reflect the jury is not in the courtroom. Mr. Dickhaus, did you have a matter to take up.

MR. DICKHAUS: Very briefly, I just wanted a clarification so I could be sure I'm in compliance with the rules of the Court. I've been informed by the marshals that I am not allowed to communicate with Mr. Low during the proceedings? Is that the correct ruling of the Court.

THE COURT: Well you can communicate. I don't have any problem.

MR. DICKHAUS: Well can he hand me a note?

THE COURT: No, I don't think handing notes. I don't know what communications you're talking about. I would assume during the pendency of this while we are in the courtroom, you ought to be watching the witnesses.

MR. DICKHAUS: I understand that, Your Honor.

THE COURT: I think you ought to wait for those things while we're in recess.

MR. DICKHAUS: Just trying to clarify so I don't run afoul of this Court. Okay.

THE COURT: Okay. Anything further?

MR. DICKHAUS: Nothing further.

* * * * *

[Ms. Becker questions Jorge Alberto Guillen]

[p. 159, line 5 direct examination of Jorge Guillen by Ms. Becker, cont']

Q. After you had talked with Agent Williams for a while, did he ask you if you would place a call to Tomas?

A. Yes, he asked me did I want to, you know, do a, to set up, to call Tomas, so I decide to do it.

Q. And was that phone call recorded?

A. Yes, it's a phone call recorded with a tape, a small recorder like this big and regular tape.

Q. If I can hand you what's been marked Government's exhibit 15.

A. Yeah this is the tape where we recorded by that time.

Q. How do you recognize that as the same tape?

A. Because it was a number, his number in here, and some letters that is not mine, but the other side, it was my initials. JG.

MS. BECKER: Your Honor, I request admission of Government's exhibit 15.

THE COURT: 15 is admitted.

MS. BECKER:

Q. Can you describe the conversation you had with Tomas during that recorded telephone call?

A. Yes, I remember.

Q. As much as you remember?

A. I remember I think all about we talking to, but I record on the phone.

Q. Why don't you tell us?

A. I was tell Tomas, "Tomas, can you give me some money to pay my brothers?" He say, "Are you do the job already?" The job is the marijuana, so if you move it, if you weigh it, you know, and packing and all the stuff, and I tell Tomas, "No, because one of my daughters," because I bring my daughters, he don't even know I bring my daughters because I don't want him to let know him, because I don't want he look at my family, in case anything happen, he don't know anything about my family. That's why I tried to protect my family to beginning.

Q. Now you mentioned that you said that he said, "Did you finish the job?" He didn't say did you weigh and package the marijuana?

A. No he don't say that. He don't mention that because he don't want to be involved in the conversation about anything.

Q. So then you mentioned to him that you had not finished the job and did you give him a reason why?

A. Yeah I give the reason because I was tell him my daughter, my little daughter, who was supposed to, that she's going to be her birthday next day Monday night December 9, I was tell him, "Sorry Tomas, we don't do nothing because my daughter is getting sick. She have like convulsions," and well one year before, that happened to my daughter, so I don't like it. I know that happened before to my daughter, but that time, it was nothing doing with this.

So I tell Tomas —

Q. You said that hadn't happened. Why did you tell him that?

A. I was me and Detective Mike Williams would decide to put an excuse to Tomas, because at that moment, I don't have nothing in my head, to think about what can I do.

Q. Why did you need an excuse?

A. Because Tomas is going to be mad because it was too late, and it was the job is there two days already, Saturday and Sunday. Tomas, he was telling me, "Why, I mean why you waiting to let me know about this time?" I said "No, because I was in the hospital with my daughter."

"So what happened to your daughter?" I was telling him that she had like convulsions. I remember that, in the tape. So he told me, "What you going to do?" I say, "I'm going to do the job tomorrow morning. My daughter she getting better now," that I need some money to pay my brothers and Dewayne.

So he told me, "Okay. But where you are?" I say, "I'm over here close by the hotel where we meeting sometimes."

Like I say, "How long do you think it would take?" "About 20 minutes."

I was tell him, "Okay." He told me, "Give me a call before you get exit."

Q. Before you?

A. Before you take the exit.

Q. What exit did he tell you to go to, if you remember?

A. I don't remember sorry about that. That I know it was after 64—which one is first 64 or 44 and 270?

Q. I'm not sure. First from which direction?

A. That exit is two exits after the 44 or 64, and then when I was ready to take the exits, I called Tomas.

Q. Did he give you directions to that location?

A. I was not there before. I know how to get there but I never paying attention, because I not interested to be in there, and I just go drop the money, sometimes, or sometimes, you know, meet him over there, but you know but that night, I just go, you know, call him before I get there.

Q. Specifically, where did he tell you to meet?

A. He told me, "Meet me over there by McDonald's," but I tell him it was too late already, so he said, "No meet me over there by 7-11 the gas station."

Q. What did you mean that it was too late to meet at McDonald's?

A. Because it was too late to meet at McDonald's. Nobody is there, by that time.

Q. So he said to me at 7-11?

A. Yes.

Q. What did you do? Did you have any further conversation?

A. By the phone?

Q. On the phone.

A. No, after he told me call me before you get exit, I was calling again, and I tell Tomas, "I'm ready to take the exit."

* * * * *

[Mr. Dickhaus questions Jorge Alberto Guillen]

[p. 180, line 4 cross-examination of Jorge Guillen, by Mr. Dickhaus cont']

Q. Let me go back to 1998. Did you have a car that was wrecked?

A. Yes, I do.

Q. You wrecked it in fact?

A. Yes, I do.

Q. And you left the scene of the accident?

A. Yes, I do.

Q. And you had your wife report the car stolen?

A. Yes, but I have a reason. For anything.

Q. But you asked your wife to report the car stolen?

A. Yes, but at anything doing.

Q. Then you filed a complaint with the insurance company to get paid for a car you wrecked, right?

A. Yes.

Q. The car wasn't stolen, was it?

A. Yes, sir.

Q. It wasn't stolen?

A. It wasn't stolen.

Q. You just wrecked it?

A. Yes, sir.

Q. And you lied to the insurance company?

A. Yes, sir.

Q. And you lied to the police?

A. Yes, sir.

Q. And in fact, you were prosecuted for making a false insurance—for insurance fraud for that false statement, weren't you? They wrote it up in the Chicago Tribune, correct?

MS. BECKER: Your Honor, I don't have a copy of that Chicago Tribune.

A. No that was not right. You are wrong about that. Sorry. That does not show up in the Chicago Tribune, because the insurance, they take the sharp from me for the comboseum (PHONETIC) for fraud.

INTERPRETER: Because of fraud.

A. So the insurance take the case, out of my case, so I was told that, you know, the officer, what happened exactly, because the only thing that I want is they can fix my car, not to pay the whole car, because the car was new, but I know it was made a mistake, like any human.

Q. Well let's see—

A. So you want to look at me like I was liar. You know, I think anybody can lie for one big reason in their life.

Q. Oh I understand. Now let me ask the questions though please.

A. Go ahead.

Q. It was a 1995 Toyota Tercel?

A. Yes, sir.

Q. You drove it into a parked car in Waukegan and fled, is that correct?

MS. BECKER: Objection, Your Honor. May we approach?

(THE FOLLOWING CONVERSATION WAS HELD AT THE SIDE BAR OUT OF THE HEARING OF THE JURY.)

MS. BECKER: Your Honor, I think he's entitled to impeach him with that conviction but not with hearsay from a newspaper article.

MR. DICKHAUS: Your Honor, I haven't admitted the newspaper article for its truth. I'm just asking him questions.

MS. BECKER: Well you're getting into the substance.

THE COURT: I'm going to sustain the objection. If there's a depiction fine; that's fair game.

MR. DICKHAUS: I don't quite understand the objection or the scope of the objection.

THE COURT: We don't put in—you can impeach him with conviction, that's no problem. But bringing in a newspaper article is not going to do it.

MR. DICKHAUS: I understand. I'm not going to admit the article.

THE COURT: Not admit it. We don't talk about it, okay. The conviction is fair, and that's it.

MR. DICKHAUS: The facts surrounding the conviction as well?

THE COURT: Read the rule, Mr. Dickhaus.

MR. DICKHAUS: I'm just asking the facts.

THE COURT: No, we want just what the conviction was for. That's all. You can give when it is and I assume you have the certified authenticated copy, do you?

MR. DICKHAUS: Pardon? We're getting a copy of the certified authenticated copy. We found it today. It wasn't turned over.

MS. BECKER: The fact of it was turned over last Tuesday, for the record.

MR. DICKHAUS: It's not enough time to get one from Cook County, Your Honor.

THE COURT: Read the rule.

(THE SIDE BAR CONFERENCE WAS CONCLUDED.).

MR. DICKHAUS:

Q. Did you plead guilty to insurance fraud?

A. Yes, I do.

Q. Did your wife also plead guilty for her involvement in insurance fraud?

A. Yes.

MS. BECKER: Objection; relevance.

THE COURT: Sustained.

MR. DICKHAUS: Withdrawn.

* * * * *

[p. 232, line 3 cross-examination of Jorge Guillen, by Mr. Dickhaus cont']

Q. I don't understand. I've been through all your statements and your sworn testimony and every time you have ever met Tomas, you've taken him money, isn't that true?

A. Yes, I do.

Q. But this time you pick up the phone at 2:00 in the morning, call him, and he runs out and brings you money?

A. Yeah because I would tell him, like I say, I didn't collect no money and he believe it to me, because I'm not going to lie to him. When I would collect some money, I give to him.

Q. You're supposed to collect the money from someone else, right?

A. Yes but I was tell him the truth. I was lying to him, that I don't receive nothing from nobody, so that's why detectives and me, you know, we do what you do, to ask him if he got to give me some money to pay my brothers and next day.

Q. And he didn't ask you what happened to the money you were supposed to collect?

A. He asked me but I was tell him nobody give me money today because I was late. You know, that's what I tell him.

Q. And he didn't ask you why can't I just bring the money in the morning?

A. No, yes, he asked me, but I was telling him no because my brothers, they already did their job, and my brothers, they want to leave.

Q. At 2:00 in the morning?

A. No, the next day. In the morning.

* * * * *

[p. 240, line 13 cross-examination of Jorge Guillen, by Mr. Dickhaus, cont']

Q. And in the past, you've lied to the police, for your own profit, haven't you?

A. Just one time, but like I said.

Q. Just one time?

A. I mean.

Q. But you're telling the truth today?

A. yeah, I was telling the truth.

* * * * *

[p. 249, line 13 re-cross examination of Jorge Guillen, by Mr. Dickhaus, cont']

Q. I'm sorry, I completely lost you on this one. I'm talking about the telephone call you and Detective Williams made to Tomas. Do you remember that phone call?

A. Yeah, we called him, and I was telling Tomas, you know what, I need to give me some money.

Q. Right and on that phone call, the reason you didn't ask Tomas to bring you drugs was because you knew Tomas didn't have drugs to bring you?

A. He had the drugs already in St. Louis.

Q. Because in fact Tomas worked for you, didn't he?

A. What is that?

Q. Tomas worked for you, didn't he?

A. Hell no. Excuse me, but that is impossible. You think how I going to have proving the defendants?

Q. Excuse me, I need to ask the question.

A. I was answer. How I going to have a public defender.

Q. Your answer is no? Is your answer no?

A. What was the question?

MR. DICKHAUS: That's withdrawn.

A. I mean how Tomas going to be the boss.

MR. DICKHAUS:

Q. There's no question pending. Now do you know where you got the money, where the money came from?

A. What money?

Q. That Dewayne paid you for the drugs?

A. I don't have an idea, but Dewayne have some people.

Q. Dewayne had people as well?

A. Yes.

MS. BECKER: Your Honor we're beyond the scope of the redirect.

THE COURT: Sustained.

MR. DICKHAUS: I have no more questions.

Supreme Court, U.S
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(6)

No. 05-352

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,
Petitioner,

v.

CUAUHTEMOC GONZALEZ-LOPEZ.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Page

Table of Authorities ii

Interest of *Amicus Curiae* 1

Summary of Argument 2

Argument 3

I. Competent Trial Counsel Are Not Fungible. 4

II. The Government's Proposed Standard For Assessing Prejudice Is Unworkable. 7

III. A Defense Attorney Is More Than Just the Advocate At Trial. 8

Conclusion 15

TABLE OF AUTHORITIES

Page(s)

CASES

Bell v. Cone, 535 U.S. 685 (2002) 5

Powell v. Alabama, 287 U.S. 45 (1932) 3

Strickland v. Washington, 466 U.S. 668 (1984) 4, 8

United States v. Booker, 543 U.S. 220 (2005) 13

United States v. Laura, 607 F.2d 52 (CA3 1979) 3, 9

Wiggins v. Smith, 539 U.S. 510 (2003) 8

Yarborough v. Gentry, 540 U.S. 1 (2003) 4, 5

RULES, STANDARDS, AND SENTENCING GUIDELINES

ABA Standards for Criminal Justice - Prosecution Function and Defense Function

Standard 4-1.2 ..... 8, 9, 10, 14
Standard 4-3.1 ..... 8, 10, 11, 12, 13
Standard 4-3.2(a) 9
Standard 4-3.2(b) 10
Standard 4-3.8(a) 8, 10
Standard 4-3.8(b) 10
Standard 4-4.1 13
Standard 4-5.1 14
Standard 4-5.2(a) 10, 11
Standard 4-5.2(b) 11

Standard 4-6.1 ..... 2, 11, 12
Standard 4-6.2 13

United States Sentencing Guidelines
Section 5H1.4 13
Section 5K2.12 13
Section 5K2.13 13

United States Supreme Court Rules
Rule 37.3(a) 1
Rule 37.6 1

MISCELLANEOUS

U.S. Sentencing Commission, Sourcebook of Federal Sentencing Statistics (2003) 2

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL"), a nonprofit corporation, is the only national bar association working in the interest of public and private criminal defense attorneys and their clients.[1] NACDL was founded in 1958 to ensure justice and due process for persons accused of crimes; to foster the integrity, independence and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. NACDL has 10,000 members nationwide -- joined by 80 state and local affiliate organizations with 28,000 members -- including private criminal defense lawyers, public defenders and law professors committed to preserving fairness within America's criminal justice system. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. Because this case raises important questions concerning a criminal defendant's right to counsel of choice and the proper remedy for a court's unjustified denial of that right, NACDL offers its practical view of the attorney-client relationship.

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1. No counsel for any party has authored this brief in whole or in part, and no person or entity, other than NACDL, has made any monetary contribution to its preparation or submission. *See* Rule 37.6, Sup. Ct. Rules. The parties have consented to the filing of this brief, and letters of consent have been lodged with the Clerk of the Court. Rule 37.3(a).

SUMMARY OF ARGUMENT

The government's analysis of the consequences of denying a criminal defendant his or her counsel of choice is premised on the theory that, as long as they perform competently at trial, criminal defense counsel are fully fungible. According to the government, a criminal defendant's constitutional right to choose the attorney he wishes to represent him can be transgressed with impunity, provided that the lawyer ultimately foisted upon him meets the constitutional standards of competence at trial. However, governmental interference with a defendant's relationship with his retained counsel undermines the central understanding of what it means for a defendant to have the assistance of counsel in his defense. Moreover, given the wide range of tactical choices and approaches present in any trial and the broad standard for adjudging attorney competence at trial, in any given criminal case two lawyers could try totally different cases and be deemed competent. Furthermore, a lawyer's individualized experience, professional reputation and personal style can make a marked difference with the prosecution, with the judge, and with the jury, as well as with the client. Accordingly, for the client, defense counsel are not fungible even if they perform competently at trial, and forcing a defendant to trial with counsel not of his choice cannot remedy denying him the counsel he has chosen to retain.

Furthermore, the government overlooks the fact that a trial is not the be-all and end-all of criminal representation.[2]

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2. Indeed, over the years only a small percentage of criminal prosecutions have proceeded to trial on a nation-wide basis. ABA Standards for Criminal Justice – Prosecution Function and Defense Function, Standard 4-6.1, commentary, 205 (3d ed. 1993) ("ABA Standards"). According to the most recent statistics

Equally critical to the attorney-client relationship are the many steps between initial interview and the decision whether there will even be a trial. As the Court has long recognized, a criminal defendant "requires the guiding hand of counsel at every step in the proceedings against him." *Powell v. Alabama*, 287 U.S. 45, 69 (1932). At each stage there must be trust and confidence between the defendant and his counsel. At each stage counsel chosen by the defendant must make critical decisions and assist the client in his or her choices. Indeed, a defendant afforded his counsel of choice will often avoid the extreme risk and ordeal of trial.

ARGUMENT

> We would reject reality if we were to suggest that lawyers are a homogeneous group. Attorneys are not fungible, as are eggs, apples and oranges. Attorneys may differ as to their trial strategy, their oratory style, or the importance they give to particular legal issues. The differences, all within the range of effective and competent advocacy, may be important in the development of the defense. Given this reality, a defendant's decision to select a particular attorney becomes critical to the type of defense he will make and thus falls within the ambit of the sixth amendment.

United States v. Laura, 607 F.2d 52, 56 (CA3 1979) (per Higginbotham, J.)

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available, 95.7% of all federal prosecutions were resolved by guilty pleas, while only 4.3% of cases went to trial. U.S. Sentencing Commission, Sourcebook of Federal Sentencing Statistics (2003) (Table 11).

I. Competent Trial Counsel Are Not Fungible.

This Court has repeatedly recognized, in the context of effective assistance of counsel, that competent defense counsel make a broad range of choices that differ dramatically and that the process of crafting a defense requires substantial discretionary judgment. Thus, the Court has set the standard for adjudging the competence of counsel at trial as "simply reasonableness under prevailing professional norms," a standard meant to cover a "wide range of reasonable professional assistance" in order to preserve "the wide latitude counsel must have in making tactical decisions." *Strickland v. Washington*, 466 U.S. 668, 688, 689 (1984). Such wide latitude is necessary, according to the Court, because "representation is an art," and "[t]here are countless ways to provide effective assistance in any given case." *Id.* at 689, 693. As the Court has recognized, "[e]ven the best criminal attorneys would not defend a particular client in the same way." *Id.* at 689. Accordingly, "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Id.*

In *Yarborough v. Gentry*, 540 U.S. 1 (2003), the Court expounded on counsel's "wide latitude in deciding how best to represent a client" in one particular critical stage of the trial, closing arguments, and cautioned that "deference to counsel's tactical decisions in his closing presentation is particularly important because of the broad range of legitimate defense strategy at that stage." *Id.* at 8. The Court pointed out that "[c]losing arguments should 'sharpen and clarify the issues for resolution by the trier of fact' [citation], but which issues to sharpen and how best to clarify them are questions with many reasonable answers." *Id.* "Indeed, it might sometimes make

sense to forgo closing arguments altogether." *Id.*, citing *Bell v. Cone*, 535 U.S. 685, 701-02 (2002). In *Bell,* the Court ruled that counsel's waiver of closing argument in the sentencing phase of a capital trial was "a tactical decision about which competent lawyers might disagree." *Id.* at 702. On the question of counsel's failure to present certain arguments to the jury in closing, the Court stated, "Focusing on a small number of key points may be more persuasive than a shotgun approach." *Yarborough*, 540 U.S. at 9. Citing experts and scholarly authority, the Court concluded, "[i]n short, judicious selection of arguments for summation is a core exercise of defense counsel's discretion." *Id.*

The broad range of competent choices and approaches which the Court explored at the closing argument stage has its parallel at each stage of the trial. At each point in a given case, competent defense counsel may take different approaches or make different decisions.

On the initial question of who will be the trier of fact, some counsel might always opt for trial by jury, whereas others may be willing to submit the matter to the judge in a given case. Where the choice is made for a jury trial, two counsel will differ greatly in jury selection, in such areas as use of a juror questionnaire, use of a jury consultant, the subjects to be explored in voir dire, and the weight (if any) to be given the defendant's own opinion of particular jurors. For any given juror, Counsel A might exercise a peremptory that Counsel B would save for another prospective juror.

Competent counsel often differ on the focus of the defense. Some counsel rely on a vigorous attack on the prosecution case, where others would opt for an affirmative defense. Some counsel are leery of alternative defenses, e.g., not guilty and not guilty by reason of insanity, for fear of losing

credibility with the jury, where others would be willing to run the risk to preserve the possibility of more than one favorable outcome.

Competent counsel may also differ on when, if at all, to make an opening statement. Some counsel make the opening right after the prosecution's in order to show that there are two sides to the story from the outset. Others prefer waiting to the close of the prosecution case-in-chief when the contours of the defense case are more settled and there is less risk of predicting evidence which later can't be produced.

Cross-examination is another area where there are major differences between counsel. Different lawyers will make very different decisions on whether to cross-examine a particular witness and, if so, the content of that cross-examination. And, style of cross-examination is a very individualized matter for every lawyer.

Counsel differ greatly on use of evidentiary objections. Some counsel hold the prosecutor to rigid adherence to the rules of evidence, where other counsel make limited use of objections to avoid alienating the jury. Similarly, some counsel make the prosecution prove its entire case, where other counsel are willing to stipulate to certain facts or testimony.

In addition to different decisions on whether to even present a defense case, counsel would often differ as to which witnesses to call, what other evidence to present, and whether to accede to the client's wishes in making the choices. Some counsel make extensive use of demonstrative evidence, audio-visual aids and expert witnesses, where others don't.

On the critical issue of whether the client will take the stand, many counsel generally oppose it because of the risk that

the client will not do well or the jury may focus too much on his or her testimony. Other counsel feel that juries do not generally acquit unless they hear the defendant's side of the story.

In closing, as in cross-examination, lawyers' styles differ greatly. Some try to be as brief as possible, where others feel a duty to explore the details of the case at length with the jury. Some may be willing to concede a particular fact, or element of an offense, or even a particular count, where others concede nothing. Some counsel will offer the jury a lesser-included offense as a compromise verdict, where others want the jury to make an all-or-nothing choice.

At each of these points, competent defense counsel might reasonably choose a different approach or make a different decision, but the different approach or different decision often will not entail constitutional incompetence or inadequacy. Rather, it would merely demonstrate the non-fungibility of competent defense counsel. The Sixth Amendment enshrines a right to retain counsel of choice. Government interference to deny a defendant his chosen counsel violates the core of that right, regardless of the competence of substitute counsel.

II. The Government's Proposed Standard For Assessing Prejudice Is Unworkable.

The government proposes that in order to vindicate his right to choose his own counsel, a defendant should be required "to show that his counsel of choice would have pursued a different defense strategy." Brief for the United States, pp. 15-16. The government, however, fails to give any meaningful definition of "defense strategy," and in practice the concept proves nebulous at best. The defense strategy at trial is actually

a series of tactical decisions, like those discussed above, made at each stage of the trial. Is any one different decision enough to be a "different defense strategy," or must there be some number of different choices or different choices at particular stages of the trial? It is precisely because defense counsel are faced with so many matters for decision at trial that the government standard is unworkable. Moreover, defense strategy is not limited to trial - it also encompasses every step from the initial interview to the decision whether to go to trial.

III. A Defense Attorney Is More Than Just the Advocate At Trial.

The government fundamentally misunderstands and minimizes the role of defense counsel vis-à-vis the client. As stated in the ABA Standards, "[t]oward the client, the lawyer is a counselor and an advocate." ABA Standard 4-1.2, commentary, 122.[3] Accordingly, "[d]efense counsel should seek to establish a relationship of trust and confidence with the accused." ABA Standard 4-3.1, p. 147. Indeed, "[n]othing is more fundamental to the lawyer-client relationship than the establishment of trust and confidence. Without it, the client may withhold essential information from the lawyer. Thus, important evidence may not be obtained, valuable defenses neglected, and, perhaps most significant, defense counsel may not be forewarned of evidence that may be presented by the prosecution." ABA Standard 4-3.1, commentary, 149-150. In this regard, it must be recognized that "[a]t best, it is difficult for a lawyer to establish and maintain a relationship of

---

3. The Court has recognized the ABA Standards as "standards to which we have long referred 'as guides to determining what is reasonable'" in adjudging defense attorney competence. *Wiggins v. Smith*, 539 U.S. 510, 524 (2003), quoting *Strickland*, 466 U.S. at 688.

confidence with an anxious client in a criminal case." ABA Standard 4-3.8, commentary, 177. "[T]he ability of a defendant to select his own counsel permits him to choose an individual in whom he has confidence. With this choice, the intimacy and confidentiality which are important to an effective attorney-client relationship can be nurtured." *United States v. Laura*, 607 F.2d 52, 57 (CA3 1979). When the court and/or the prosecution intervenes to deny the defendant his chosen counsel without justification, the defendant's ability to trust any counsel at all is inherently threatened.

Defendants' confidence that their lawyers are truly *their* counselor and advocate is critical from the moment that counsel is retained. Because "[t]he client is usually the lawyer's primary source of information for an effective defense," counsel is charged with seeking to know "all relevant facts known to the accused" as soon as practicable. ABA Standard 4-3.2(a) & commentary, 152. As a matter of common experience, criminal defendants are often reluctant to disclose unfavorable facts to the lawyer "for fear the lawyer will lose confidence in his or her innocence and thus fail to pursue the case zealously." *Id.*, commentary. Counsel of choice is better able to overcome this natural reluctance because "a lawyer who is privately retained generally has the confidence of the client, who after all has made a conscious choice of counsel." ABA Standard 4-1.2, commentary, 125. On the question of full disclosure to counsel and, indeed throughout the case, "[t]he client's desire to retain the lawyer gives the lawyer's persuasion greater standing with the client." *Id.*

In this regard, it is important to remember that the choice of retaining a particular lawyer is hardly a snap decision. The client often will have developed a list of defense counsel to be considered, with suggestions from a variety of sources,

such as family members, friends, business and social acquaintances, and other attorneys, among others. After initial contact with lawyers identified in order to determine general availability, the client will have selected certain lawyers to meet with. At those meetings, the client will have explored a variety of topics, such as the lawyer's prior experience (both trial and otherwise), the lawyer's proficiency in motion work, the lawyer's familiarity with the court and the prosecution, the lawyer's manner of dealing with his or her clients, the lawyer's current caseload, etc. Only after the client feels that this particular lawyer is the best one to be his counselor and representative will the lawyer be retained. It is this process that molds the trust that the defendant feels in his or her chosen counsel and that produces the confidence to follow the lawyer's advice.

In addition to a duty to initially discuss the objectives of the representation with the client (ABA Standard 4-3.1, p. 147), defense counsel is bound to "keep the client informed of the developments in the case and the progress of preparing the defense" and to "promptly comply with reasonable requests for information." ABA Standard 4-3.8(a), pp. 176-177. A critical part of this duty and of the attorney-client relationship in general is the requirement to "explain developments in the case to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." ABA Standard 4-3.8(b), p. 177. Certain decisions -- including what pleas to enter, whether to accept a plea agreement, whether to waive jury trial, and whether to testify in his or her own behalf -- are reserved to the client "after full consultation with counsel." ABA Standard 4-5.2(a), pp. 199-200, As to these, counsel's role is clear: "the accused should have the full and careful advice of counsel." *Id.*, commentary, 201. And, while counsel cannot demand that the client follow the lawyer's advice as to the best course of action nor coerce a decision

through misrepresentation or undue influence, *id.*, "counsel is free to engage in fair persuasion and to urge the client to follow the proffered professional advice." *Id.* The advice of counsel of choice, who generally will have the confidence of the client, will carry greater weight with the client in making these important decisions. ABA Standard 4-1.2, commentary, 125.

The relative roles of client and counsel in other decisions are murkier. The basic rule is that "[s]trategic and tactical decisions should be made by defense counsel," including what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions to make, and what evidence to introduce. ABA Standard 4-5.2(b), pp. 199-200. However, counsel's decisions on these matters should be made only "after consultation with client where feasible and appropriate." *Id.* In determining how such client consultation should play into counsel's decisions, the only guidance given is that "[t]he lawyer should seek to maintain a professional relationship at all stages while maintaining the ultimate choice and responsibility for the strategic and tactical decisions in the case." *Id.*, commentary, 202. Counsel is better able to accomplish this delicate balancing act if he or she has been chosen by the defendant and has the defendant's confidence.

"After informing himself or herself fully on the facts and the law," defense counsel must also "advise the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome." ABA Standard 4-5.1(a), p. 197. In this regard, two points must be recognized: "[t]he lawyer's responsibility to know the law is a challenging one, given the rapid pace of change in many areas of criminal law and procedure," and "elements of uncertainty surround any estimate of probable outcome." *Id.*, commentary, 198.

One of the most important stages preceding any trial is exploration of the possibility of resolving the case without trial through a plea agreement. "Since disposition by plea is mutually advantageous in many circumstances, involvement in plea discussions is a significant part of the duty of defense counsel." ABA Standard 4-6.1, commentary, 204. Indeed, "[p]lea discussions should be considered the norm and failure to seek such discussions an exception unless defense counsel concludes that sound reasons exist for not doing so." *Id.* "[I]n many cases it will be appropriate to make an early contact with the prosecutor to secure information concerning the charge." *Id.* "In the course of this contact, the possibility of reducing the charge or making a plea may arise and counsel may have an opportunity to advance the client's interests without making any disclosures concerning the defense." *Id.* "Especially when good professional relations exist between the lawyer and the prosecutor, even the most casual and informal discussion of the case can produce information useful to the defense." *Id.* at 205-206.

An individual lawyer's experience with the prosecutor may be important in another way. "Courts and prosecutors have developed criteria that guide the exercise of their discretion. These standards and rules of thumb are not to be found in codes, case reports, and other sources of law, but a working understanding of them is part of the accumulated skill and experience of the effective defense lawyer. Ignorance of the prevailing practices and attitudes of the prosecutor and the court as to plea discussions may be as much a handicap to effective representation as is unfamiliarity with the facts or law related to the case; hence, it is imperative that the defense lawyer be or become aware of them." *Id.* at 204.

In deciding whether to approach the prosecutor to discuss the possibility of a resolution without trial, defense

counsel need not generally seek the consent of his client. *Id.* at 205. Indeed, "unless advised to the contrary by his or her client, defense counsel may ordinarily proceed on the assumption, for purposes of discussion with the prosecution only, that the defendant may be willing to enter a plea of guilty to some charge," but counsel can never yield the position that the defendant can and will, if he or she desires, put the prosecution to the proof. ABA Standard 4-6.2, commentary, 207.

Plea discussions are more likely to be productive if counsel can present the prosecutor facts that mitigate the offense or portray the defendant in a more favorable light. Thus, defense counsel "has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing." ABA Standard 4-4.1, commentary, 183. "Information concerning the defendant's background, education, employment record, mental and emotional stability, family relationships, and the like will be relevant." *Id.* Counsel chosen by the defendant and enjoying his or her trust will be better able to persuade the client to make full disclosure in the more-sensitive of these areas.[4]

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4. Since this Court struck down the mandatory nature of the federal sentencing guidelines in *United States v. Booker*, 543 U.S. 220 (2005), it is even more imperative that the client have full faith and confidence in his or her counsel to whom it might be necessary to divulge painful or embarrassing facts to support sentencing departures that were theretofore prohibited. See, e.g., U.S.S.G. § 5H1.4 (drug or alcohol dependence); *id.* § 5H1.12 (lack of guidance as a youth); *id.* § 5K2.12 (personal financial difficulties); *id.* § 5K2.13 (diminished capacity where the offense involved violence or serious threat of violence).

Defense counsel must keep the client advised of developments arising out of plea discussions, and must promptly communicate and explain all significant plea proposals made by the prosecutor, even if it is one that the lawyer would not approve. ABA Standard 4-6.2, pp. 206, 208. "The decision to plead guilty can be an intelligent one only if the defendant has been advised fully as to his or her rights and as to the probable outcome of alternative choices." ABA Standard 4-5.1, commentary, 198. "The matters on which the defendant needs advice before entering a plea go beyond appraisal of the likelihood of conviction or acquittal." *Id.* "Counsel should inform the defendant of the maximum and minimum sentences that can be imposed, but counsel should also be aware of the sentencing practices of the court and advise the defendant, when that is possible, what sentence is likely." *Id.* "Once the lawyer has concluded that it is in the best interests of the accused to enter a guilty plea, it is proper for the lawyer to use reasonable persuasion to guide the client to a sound decision." *Id.* Here especially, it can be critical that counsel chosen by the client will generally have his or her confidence, and therefore counsel's persuasion will carry greater weight with the client. ABA Standard 4-1.2, commentary, 125.

Thus, the relationship of the defendant and his or her attorney is much more complex and individualized than the government recognizes. As the client treads his or her way through the criminal legal process, his or her confidence in that defense counsel is of the utmost significance and, at any step, may determine where the client's journey will ultimately end. When the client or the client's family has the financial means to retain an attorney, the client has the constitutional right to choose an attorney who is not only competent but whom the client believes in enough to entrust with his or her future. That trust and confidence will be the bedrock of the attorney-client

relationship and will significantly affect each step of the criminal case. When a defendant is wrongly denied the attorney he or she has chosen and has another lawyer foisted upon him or her, interactions between the client and his or her attorney will never be the same, no matter the technical competence of the unchosen attorney. As a result, the defendant may find himself in a trial that his chosen counsel would have avoided. Thus, when the court and/or prosecution intervenes to displace a criminal defendant's chosen counsel, it transgresses the core value of the Sixth Amendment right to counsel, and reversal is necessary without any particularized showing of prejudice.

CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeals for the Eighth Circuit should be affirmed.

Respectfully submitted,

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Counsel of Record

(5)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

United States of America,
Petitioner,

v.

Cuauhtemoc Gonzalez-Lopez,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

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QUESTION PRESENTED

Whether a district court's erroneous denial of a criminal defendant's Sixth Amendment right to be represented by counsel of choice requires automatic reversal of his conviction.

TABLE OF CONTENTS

QUESTION PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iv
STATEMENT OF THE CASE 1
SUMMARY OF ARGUMENT 9
ARGUMENT 12
I. A Trial Court's Unjustified Refusal To Allow A Defendant To Be Represented By Counsel Of His Choice Violates The Sixth Amendment, Irrespective Of Any Demonstrable Prejudice 12
A. The Right To Counsel Of Choice Lies At The Historical Core Of The Sixth Amendment's Guarantee Of The "Assistance of Counsel." 12
B. Modern Legal Developments Have Not Altered The Basic Rule That A Trial Court Violates A Defendant's Right To Counsel Of Choice At The Moment It Erroneously Refuses To Allow A Defendant's Retained Counsel To Represent Him. 21
1. The Right To Counsel Of Choice Protects Interests Distinct From Merely Guaranteeing An Adversarial Process 22
2. None Of The Sixth Amendment Doctrines That Look More Generally To The Adversarial Process Suggests That In The Context Of This Case Any Showing Of Prejudice Should Be Required To Make Out A Constitutional Violation 25
C. Practical Considerations Require Treating Unjustified Denials Of Counsel Of Choice As Complete Constitutional Violations 30

II. The Court Of Appeals Correctly Held That The Proper Remedy For The Trial Court's Sixth Amendment Violation In This Case Is A New Trial. .. 38
A. An Unjustified Denial Of Counsel Of Choice Is Structural Error. 39
B. Even If Denial Of A Criminal Defendant's Sixth Amendment Right To Counsel of Choice Is Not Structural Error, The Error In This Case Still Requires Reversal. 44
CONCLUSION 48
APPENDIX 1a

TABLE OF AUTHORITIES

Cases

Andersen v. *Treat*, 172 U.S. 24 (1898) 20
Arizona v. *Fulminante*, 499 U.S. 279 (1991) ... 8, 38, 40, 44
Baker v. *State*, 56 N.W. 1088 (Wisc. 1893) 18
Blakely v. *Washington*, 542 U.S. 296 (2004) 22
Bland v. *Cal. Dep't of Corrs.*, 20 F.3d 1469 (CA9 1994) 38
Brown v. *United States*, 411 U.S. 223 (1973) 44
Bumper v. *North Carolina*, 391 U.S. 543 (1968) 44
Bute v. *Illinois*, 333 U.S. 640 (1948) 20
Caplin & Drysdale, Chartered v. *United States*, 491 U.S. 617 (1989) 22
Case of Fries, 9 F. Cas. 924 (Cir. Ct. D. Pa. 1800) 20
Chambers v. *Maroney*, 399 U.S. 42 (1970) 44
Chandler v. *Fretag*, 348 U.S. 3 (1954) 19
Chapman v. *California*, 386 U.S. 18 (1967) 38, 44, 45
Crawford v. *Washington*, 541 U.S. 36 (2004) 28
Delaware v. *Van Arsdall*, 475 U.S. 673 (1986) 27, 44
Delk v. *State*, 100 Ga. 61 (1896) 17, 18
Delk v. *State*, 99 Ga. 667 (1896) 17
Faretta v. *California*, 422 U.S. 806 (1975) ..... passim
Flanagan v. *United States*, 465 U.S. 259 (1984) 24, 34
Florida v. *Nixon*, 543 U.S. 175 (2004) 41
Gideon v. *Wainwright*, 372 U.S. 335 (1963) 21, 29
Glasser v. *United States*, 315 U.S. 60 (1942) 44
Harrington v. *California*, 395 U.S. 250 (1969) 44
Hill v. *Lockhart*, 474 U.S. 53 (1985) 34
Holloway v. *Arkansas*, 435 U.S. 475 (1978) 43, 44
Illinois v. *Allen*, 397 U.S. 337 (1970) 39
In re Ades, 6 F. Supp. 467 (D. Md. 1934) 24

Johnson v. *Zerbst*, 304 U.S. 458 (1938) 29
Jones v. *Barnes*, 463 U.S. 745 (1983) 41
Martinez v. *Court of Appeal of Cal.*, 528 U.S. 152 (2000) 23
Maryland v. *Craig*, 497 U.S. 836 (1990) 27
McCleary v. *State*, 89 A. 1100 (Md. 1914) 18
McKaskle v. *Wiggins*, 465 U.S. 168 (1975) 23, 40
McMann v. *Richardson*, 397 U.S. 759 (1970) 29
Mickens v. *Taylor*, 535 U.S. 162 (2002) 43
Milton v. *Wainwright*, 407 U.S. 371 (1972) 44
Neder v. *United States*, 527 U.S. 1 (1999) 39, 43, 44
Offutt v. *United States*, 348 U.S. 11 (1954) 25
People v. *Gordon*, 30 N.Y.S.2d 625 (N.Y. App. Div. 1941) 18, 19
People v. *Price*, 187 N.E. 298 (N.Y. 1933) 18
Perry v. *Leeke*, 488 U.S. 272 (1989) 27
Powell v. *Alabama*, 287 U.S. 45 (1932) 19
Richardson-Merrell, Inc. v. *Koller*, 472 U.S. 424 (1985) 31
Rodriguez v. *Chandler*, 382 F.3d 670 (CA7 2004) 30, 47
Rose v. *Clark*, 478 U.S. 570 (1986) 40
Schell v. *Witek*, 218 F.3d 1017 (CA9 2000) 38
Strickland v. *Washington*, 467 U.S. 1267 (1984) ..... passim
Sullivan v. *Louisiana*, 508 U.S. 275 (1993) 45
Taylor v. *Illinois*, 484 U.S. 400 (1988) 27, 41, 42
Ungar v. *Sarafite*, 376 U.S. 575 (1964) 26
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United States v. *Childress*, 58 F.3d 693 (CADC 1995) 38
United States v. *Cronic*, 466 U.S. 648 (1984) 27
United States v. *Curcio*, 694 F.2d. 14 (CA2 1982) 23

United States v. *Gonzalez Lopez*, Memorandum and Order (E.D. Mo. Aug. 26, 2003) (Dist. Ct. docket number 303) 3
United States v. *Gonzalez-Lopez*, 403 F.3d 558 (CA8 2005) 7
United States v. *Laura*, 607 F.2d 52 (CA3 1979) 22
United States v. *Lopez*, 343 F. Supp. 2d 824 (E.D. Mo. 2004) 4
United States v. *Martin Linen Supply Co.*, 430 U.S. 564 (1977) 22
United States v. *Mendoza-Salgado*, 964 F.2d 993 (CA10 1992) 38, 41
United States v. *Olano*, 507 U.S. 725 (1993) 25
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United States v. *Santos*, 201 F.3d 953 (CA7 2000) 31
United States v. *Serrano, et al.*, No. 4:01CR450-JCH (E.D. Mo.) 3
United States v. *Voigt*, 89 F.3d 1050 (CA3 1996) 37, 38
Wheat v. *United States*, 486 U.S. 153 (1988) ..... passim
Wilson v. *Mintzes*, 761 F.2d 275 (CA6 1985) 23, 38
Word v. *Commonwealth*, 30 Va. (3 Leigh) 743 (1827) 16
Young v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987) 24

Statutes

18 U.S.C. 563 (1940) 20
28 U.S.C. 1654 (2005) 17
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Rules

E.D. Mo. Bankr. Local Rule 2090-1 4

E.D. Mo. Local Rule 83-12.01(E) 33

W.D. Mo. Local Rule 83.5(k) 4

Constitutional Provisions

Del. Const. of 1792, art. I, § 7 16

Mass. Const. of 1780, pt. I, art. XII 16

Pa. Const. of 1776, Declaration of Rights, IX 16

U.S. Const. amend VI ..... passim

Vt. Const. of 1777, ch. I, par. X 16

BRIEF FOR THE RESPONDENT

Respondent Cuauhtemoc Gonzalez-Lopez respectfully requests that this Court affirm the judgment of the United States Court of Appeals for the Eighth Circuit.

STATEMENT OF THE CASE

From its earliest origins, the right to assistance of counsel has been understood to preclude the government from unjustifiably refusing to allow the accused to be represented by the counsel of his choice. And in the rare instances when trial judges have transgressed this constraint, appellate courts on direct review consistently have held that these errors require reversal and new trials. The question in this case is whether this Court should dramatically alter this landscape and accept the government's argument – never before adopted by any court – that criminal defendants erroneously denied the ability to be represented by their chosen and retained counsel may not obtain a new trial unless they proceed to trial with an incompetent lawyer or one who the defendant can show was otherwise so inept that he failed to pursue a "strategy that would have created a reasonable probability that * * * the result of the proceeding would have been different." Petr. Br. 16 (internal quotation omitted).

1. *The Underlying Criminal Prosecution.* This case arises from an alleged drug conspiracy. In December 2002, DEA agents arrested several individuals, including Jorge Guillen, who were transporting several hundred pounds of marijuana. On that very night, Guillen agreed to cooperate with the government. At the DEA's urging, Guillen phoned respondent on a recorded line, supposedly to set up a payment related to the drugs.

In response to Guillen's call, respondent appeared at an arranged meeting place – a mini-mart – and gave Guillen about ten thousand dollars. After the meeting, federal agents stopped respondent's vehicle, but found no drugs either on respondent, in his car, or in a subsequent search of his

apartment. Trial Tr. Vol. III, 167:2, July 9, 2003. Nonetheless, on January 7, 2003, federal prosecutors in the Eastern District of Missouri charged respondent with conspiring to distribute marijuana.

When respondent's family learned that he had been arrested, a family member retained John Fahle, a Texas attorney who had never met respondent, to represent him. Fahle appeared at respondent's arraignment hearing the day after his arrest. Pet. App. 2a. But Fahle never met with respondent at the detention facility in which he was held, and Fahle's office did not even accept respondent's telephone calls from the facility. Mot. Hearing Tr. 26:3-27:20, June 20, 2003.

As respondent became increasingly despondent concerning Fahle's services, he learned about another attorney: Joseph Low. Low, who is licensed in California, is a seasoned criminal defense lawyer and a Senior Instructor at Gerry Spence's Trial Lawyers College. He has received several national awards for excellence in the courtroom, including Trial Advocate of the Year from the American Board of Trial Advocates. See The Law Offices of Joseph H. Low, IV, Curriculum Vitae, http://www.aggressivecriminal defenselawyers.com/resume.html (last visited Mar. 25, 2006). As evidenced by his website, Low prides himself on his aggressive approach to criminal defense work and has built his practice around fighting "oppression by federal and state government." See, *e.g.*, Christine Hanley, *Ex-Cop Alleges Abuse by O.C. Police Agencies*, L.A. Times, Apr. 5, 2003, at 6; Charles F. Bostwick, *Search Suit Ends in Deal, Local Deputy Involved in Case*, Daily News of L.A., Dec. 5, 2002, at AV1.

Respondent was particularly interested in Low because, unlike many co-defendants charged in the alleged conspiracy, respondent maintained his innocence and wanted to defend himself vigorously. Respondent knew that Low recently had represented a defendant in another drug conspiracy case

before the same judge presiding over respondent's case. See Pet. App. 2a. In that case, *United States* v. *Serrano, et al.*, No. 4:01CR450-JCH (E.D. Mo.), Low had replaced as counsel for one of the defendants a CJA (Criminal Justice Act) panel lawyer who practiced regularly in front of the court. After just two days of trial, during which Low vigorously attacked the government's investigation and version of events, Low persuaded the government to offer a particularly favorable plea deal. Although Low's client, Jose Serrano, faced "a sentence of up to life in prison," *Law and Order Column*, St. Louis Dispatch, Jan. 9, 2003, at B2, Low secured for him a sentence of 156 months.

Respondent telephoned Low, and Low promptly flew to Missouri and met with him. Ten days later, respondent hired Low to defend him. Pet. App. 2a. On February 18, 2003, Low informed Fahle that he, too, was representing respondent in the case. See Memorandum and Order, *United States* v. *Gonzalez Lopez*, at 5 (E.D. Mo. Aug. 26, 2003) (Dist. Ct. docket number 303).

About two weeks later, Fahle and Low attended a suppression hearing before a magistrate. The magistrate initially accepted Low's provisional entry on respondent's behalf and allowed him to participate in the hearing on Low's assurance that he soon would file a motion for admission pro hac vice. But while Fahle was cross-examining a government agent about having erased the taped phone call between Guillen and respondent, the magistrate rescinded this provisional entry, allegedly because Low began passing notes to Fahle. Pet. App. 3a. The magistrate claimed, without any explanation, that this everyday practice between co-counsel violated the court's rule against two attorneys cross-examining a witness.

Soon thereafter, respondent informed Fahle that he wanted Low to be his sole attorney and asked Fahle to withdraw from the case. Pet. App. 3a.

2. *The District Court Denies Low Admission Pro Hac Vice.* Within the week, Low filed a motion with the district court for pro hac vice admission. He also contacted a local attorney he knew named Karl Dickhaus and asked him to serve as local counsel. Dickhaus is primarily a consumer protection attorney specializing in prosecuting "junk fax" law claims under the federal Telephone Consumer Protection Act. See Junk Fax Attorney Reference, http://www.junkfax.org/fax/basic_info/attorneys.htm (last visited Mar. 25, 2006). Dickhaus had little experience relevant to respondent's case, Pet. App. 5a; in fact, when Low called him, he had never tried a federal criminal case. Low nevertheless chose him to serve as local counsel because Low was confident his application for admission pro hac vice ultimately would be granted. And federal courts in Missouri, as is typical elsewhere, encourage attorneys appearing pro hac vice from distant locations to affiliate with local counsel, who can be available for unscheduled hearings and to help with filings.[1] Low and Dickhaus agreed that Dickhaus's role would be limited to such nonsubstantive tasks.

The district court, however, denied Low's pro hac vice motion without explanation. A month later, the district court

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[1] Some federal courts in Missouri have specific local rules encouraging this practice or allowing judges to require local counsel. See W.D. Mo. Local Rule 83.5(k) ("[T]he judge to whom the action is assigned may, in his or her discretion, require the attorney to retain a local attorney, who is a member in good standing of this Bar, who can be available for unscheduled meetings and hearings."); E.D. Mo. Bankr. Local Rule 2090-1(B)(2) ("The Court encourages visiting attorneys admitted pro hac vice to affiliate with local counsel."). The United States District Court for the Eastern District of Missouri does not have a specific rule to this effect, but its judges have the same preference for local counsel. See, *e.g.*, *United States* v. *Lopez*, 343 F. Supp. 2d 824, 837 (E.D. Mo. 2004) (noting that defendant whose attorney was appearing pro hac vice from Florida was "required to retain local counsel").

denied a second such motion, again without explanation. Pet. App. 3a. Following these denials, Low filed an application for a writ of mandamus in the Eighth Circuit seeking to compel the district court to grant him pro hac vice status, but that application was dismissed. Low then applied for general admission to the Eastern District of Missouri. *Ibid.*

Meanwhile, Fahle withdrew from respondent's case, and the district court indicated that it would permit a continuance only if another attorney entered an appearance on respondent's behalf within two weeks. Accordingly, Dickhaus entered his appearance. Pet. App. 4a. But that was only a temporary fix; the trial date continued to approach, and the court continued to hold Low's motion for admission to the local bar without taking any action. Dickhaus grew increasingly concerned that Low's status would not be resolved before the trial and moved for another continuance. The district court, however, denied the motion. Resp. C.A. Br. 12.

Shortly before the trial, the district court made clear that it would not permit Low to represent respondent and gave its first explanation for denying Low's pro hac vice application. The court asserted that there were "allegations of ethical improprieties" in the *Serrano* case, including "contact[ing] a criminal defendant with preexisting legal representation" in violation of Missouri Rule 4-4.2. Pet. App. 4a.

On the first day of respondent's trial, Dickhaus asked that Low at least be allowed to sit at counsel table and assist him during the proceedings. J.A. 20. The district court denied the plea and relegated Low to the audience section of the courtroom, forbidding respondent and Dickhaus from all contact with Low during the trial. Pet. App. 5a. The district court even placed a United States Marshal between respondent and Low during the trial. The court prevented respondent from meeting with Low in the mornings, during lunch or other breaks, or after the trial concluded for the day. The U.S. Marshals also refused to let Low visit respondent at

the detention facility in the evenings because Low was "not an attorney of record in this case." J.A. 21; Pet. App. 5a. Only on the last night of the trial was respondent permitted to meet with Low. Pet. App. 5a

3. *Respondent's Trial.* The government's theory of the case was that respondent owned the marijuana it had caught Jorge Guillen with, and that respondent had appeared at the mini-mart to give Guillen money to pay him and his brothers for transporting it. See J.A. 23-24 (government's opening argument). Guillen, therefore, was the prosecution's star witness. He testified on direct examination that he convinced respondent to meet him at the mini-mart in order to deliver money needed for the drug deal. *Id.* at 31-32. Although the government recorded this critical phone conversation, police officers repeated their testimony from the earlier suppression hearing that they had mistakenly erased the tape before making any copies. Trial Tr. Vol. III, 19:14-25, July 9, 2003. The government's case thus turned to a large extent upon Guillen's testimony, and upon his credibility in general.

Dickhaus argued in respondent's defense that the government had insufficient evidence to convict. Respondent, he asserted, "was just a blind mule" who "may or may not have even known" he was delivering money related to some illegal activity. J.A. 25 (opening argument). Yet in the face of Guillen's testimony that respondent's involvement was far more substantial and far clearer, the most Dickhaus told the jury was that no one could know for sure whether respondent knew what he was doing when he gave money to Guillen at the mini-mart that night. And Dickhaus was unable to impeach Guillen's testimony in any other significant way. At the close of the cross-examination, Guillen testified without contradiction that he had lied only once in his life, with respect to an insurance issue wholly unrelated to this case. See *id.* at 34-35, 39.

After Dickhaus concluded his defense, which consisted of only one testifying witness (an expert on law enforcement

procedures), the jury found respondent guilty of the sole count of the indictment. Pet. App. 5a. The district court sentenced him to 292 months in prison.

4. *Sanctions Proceedings.* In response to a motion Fahle filed the day he had withdrawn from respondent's case, the district court held a hearing to determine whether to sanction Low for violating Missouri Rule 4-4.2 by contacting respondent (allegedly the same conduct at issue in *Serrano*). Despite acknowledging that the government was "not a movant" in the proceeding – and without any advance warning to Low or Dickhaus – the federal prosecutor in respondent's case appeared at the sanctions hearing to offer evidence against Low. Mot. Hearing Tr. 45:2, 167:6-11, June 20, 2003. Noting that the government "ha[d] an interest," *id.* at 45:7, the district court allowed the prosecutor to call witnesses regarding Low's actions in *Serrano*.[2] The district court granted Fahle's motion for sanctions against Low for supposedly improperly contacting respondent while Fahle was representing him. The court also reaffirmed its repeated denials of Low's pro hac vice applications in respondent's case, relying heavily on allegations regarding the *Serrano* case that the government presented at the sanctions hearing. Pet. App. 4a-6a, 9a-10a.

5. *Eighth Circuit Proceedings.* The Eighth Circuit reversed the sanctions against Low and vacated respondent's conviction. In a decision not challenged here, Petr. Br. 6 n.2, the court of appeals first held that the district court had misinterpreted Missouri Rule 4-4.2 with respect to Low's actions in *Serrano* and here. Low's actions, the court of appeals concluded, were entirely proper, because he did not represent any other relevant clients when he met with Serrano and respondent. *United States* v. *Gonzalez-Lopez*, 403 F.3d 558, 566 (CA8 2005); see also Pet. App. 11a-12a.

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[2] At the sanctions hearing, the government directly examined two witnesses, provided an affidavit of a third witness regarding alleged improprieties, and cross-examined Low.

Having found that the district court had absolutely no justification for denying Low's pro hac vice motion, the court of appeals held that the district court had violated the Sixth Amendment by denying respondent the assistance of the counsel of his choice. Recognizing that "[l]awyers are not fungible" and that "the right to privately retain counsel of choice derives from a defendant's right to determine the type of defense he wishes to present," Pet. App. 6a (citations omitted), the Eighth Circuit joined "nearly all the circuit courts to address this issue" and determined that an unjustified denial of counsel of choice constitutes a "structural error" under *Arizona* v. *Fulminante*, 499 U.S. 279, 306-10 (1991). Pet. App. 15a, 17a. Accordingly, under this Court's precedents, the violation "results in automatic reversal of the conviction." *Id.* at 16a.

6. *Remand Proceedings.* After the Eighth Circuit issued its mandate, the parties began preparing for the new trial – this time with Low representing respondent. On May 26, 2005, Low deposed Jorge Guillen, whom the INS was set to deport. Under intense questioning from Low, Guillen admitted under oath that he had lied numerous times during respondent's trial about respondent's involvement in the conspiracy. See App. 3a-4a. Guillen also acknowledged a more general problem with veracity. See *id.* at 1a ("You know, I'm [a] liar. I mean I'm not going to say no."). In addition to admitting outright lies, Low's questioning revealed that the meeting and monetary exchange at the mini-mart was not to finance a drug deal – the critical claim Guillen had made at trial – but was instead a response to Guillen's fabricated plea for money to help his sick daughter. See *id.* at 1a-3a.

Shortly after Low's deposition of Guillen, the government filed a petition for certiorari in this Court and convinced the district court to stay the remand proceedings pending this Court's disposition. The petition for certiorari was granted on January 6, 2006. 126 S. Ct. 979 (2006).

SUMMARY OF ARGUMENT

I. A trial court's unjustified refusal to allow a defendant to retain and be represented by the counsel of his choice violates the Sixth Amendment, without regard to whether the unjustified refusal has a demonstrable effect on the verdict in the defendant's case.

A. The historical core of the right to counsel is the right to counsel of choice. Well-known trials before the Framing drilled into American colonists the importance of allowing defendants to select and be represented by their chosen attorneys. Consequently, state constitutions and customary practice prevented courts from interfering with defendants' ability to be represented by qualified counsel. This understanding carried over into the Sixth Amendment. Before the Assistance of Counsel Clause guaranteed anything else, it guaranteed defendants the right to be represented by their retained lawyers, provided courts had no legitimate reason to preclude such representation. Congress echoed this view in contemporaneous legislation, and state and federal appellate decisions during the nineteenth and early twentieth centuries confirmed that this right was understood to exist on its own terms, apart from any ability to demonstrate that its denial affected the verdict in a particular case.

B. This Court's contemporary Sixth Amendment jurisprudence is consistent with this historical perspective. This Court's decisions recognize that protecting a defendant's ability to proceed through the retained counsel of his choice protects values beyond simply ensuring an objectively accurate trial. The right interposes a vital check on governmental abuse; respects defendants' autonomy and dignity; and ensures that criminal trials appear fair to the public. To be sure, the right to counsel of choice also is designed to make certain that an adequate adversary process occurs; thus, when a defendant's choice of counsel would undermine the integrity of the trial or poses a risk of providing ineffective assistance, courts can override that

choice. But when, as here, there is no countervailing interest in protecting the adversary process and the trial court erroneously impinges upon the other values the Assistance of Counsel Clause protects, a constitutional violation necessarily occurs. Otherwise, the government could disqualify legitimate, retained counsel with impunity – and could even force non-indigent defendants to accept particular counsel against their wishes – so long as an objectively "fair" trial ensued. Although the government suggests this never would occur because judges will act in "good faith" with respect to chosen counsel, Petr. Br. 30, such assurances are not good enough when it comes to liberties the Framers made a point to enshrine in the Sixth Amendment.

C. Practical considerations also weigh heavily against this Court's accepting the government's novel proposal to re-conceptualize the right to counsel of choice. The proposal would dramatically shift the incentives faced by prosecutors, courts, and defendants alike. With respect to prosecutors, the effective removal of any cost to making a disqualification motion – since retrial would be required only in the rare case when the defendant could show that substitute counsel was essentially ineffective – would create an incentive for overzealous prosecutors to seek the removal of particularly effective defense counsel, and these motions will place burdens on both the courts and defendants. With respect to courts, the government's proposed rule would deflect attention from the constitutionally recognized interests of defendants in proceeding with their chosen counsel and toward a wholly hypothetical inquiry into whether substitute counsel would provide effective assistance. And with respect to defendants, the proposal would create a series of perverse incentives that would force them to choose between preserving and vindicating their right to their counsel of choice on the one hand and seeking the best outcome possible with substituted counsel on the other.

What is more, the government's proposal would create a new and unwieldy kind of habeas litigation. Defendants

seeking to vindicate their right to counsel of choice would have no choice but to file collateral causes of action in order to prove prejudice at evidentiary hearings involving trials-within-trials. And all this to solve a problem that simply does not exist. It currently is exceedingly rare for trial courts erroneously to disqualify defendants' chosen counsel, and the government has failed to point to a single actual case in which a defendant received a windfall on appeal by virtue of the lower courts' longstanding automatic reversal rule.

II. The Eighth Circuit correctly held that the trial court's error here entitles respondent to a new trial.

A. This Court repeatedly has held that "structural errors" require automatic reversal of a defendant's conviction. A denial of the right to counsel of choice is a structural error for two independent reasons. First, the right protects interests of personal autonomy and dignity that go beyond merely ensuring the "correct" trial outcome. Second, a defendant's selection of a particular attorney permeates an entire trial – indeed, an entire defense. A defendant's attorney is his alter ego in negotiating with prosecutors and presenting his case in court, and the attorney makes innumerable tactical and stylistic decisions that affect the defendant's fate. Accordingly, it is impossible to isolate and assess the effect of a trial court's erroneous denial of counsel of choice.

B. Even if the denial of counsel of choice were not structural error, the error in this case calls the outcome sufficiently into question to warrant a new trial. When a court commits a nonstructural constitutional error, the government can avoid a new trial only by proving on appeal that the error was harmless beyond a reasonable doubt. The government plainly cannot carry that burden here. Respondent's preferred counsel was far more experienced and skilled than his substitute counsel, and proceedings on remand from the Eighth Circuit's decision below confirm that the preferred counsel would have been able to call the government's case into question in ways the substitute counsel did not.

Indeed, even if defendants had to demonstrate some level of prejudice to obtain redress from erroneous denials of counsel of choice, such prejudice would be present here. Respondent's chosen attorney would have pursued a different trial strategy than his substitute counsel did. Instead of simply arguing that there was insufficient evidence to support conviction, as substitute counsel did, the chosen attorney would have offered a totally innocent explanation for respondent's actions. Through cross-examination of Jorge Guillen, the government's star witness who testified he set up the critical payment of supposed drug money, his counsel of choice would have shown that Guillen in fact convinced respondent to meet him to give him money to help his sick daughter. This strategy of arguing actual innocence would have had a reasonable probability of success.

ARGUMENT

I. A Trial Court's Unjustified Refusal To Allow A Defendant To Be Represented By Counsel Of His Choice Violates The Sixth Amendment, Irrespective Of Any Demonstrable Prejudice.

The government's argument that a trial court may refuse to allow a criminal defendant to be represented by retained counsel of his choice so long as the overall adversary process is not objectively and demonstrably impaired ignores the history, purpose, and practical operation of the Sixth Amendment's Assistance of Counsel Clause.

A. The Right To Counsel Of Choice Lies At The Historical Core Of The Sixth Amendment's Guarantee Of The "Assistance of Counsel."

Although the government characterizes the right "to select and be represented by one's preferred attorney," *Wheat* v. *United States*, 486 U.S. 153, 159 (1988), as a "qualified" or "subordinate" right, Petr. Br. 8-9, this right actually forms the

historical core of the Assistance of Counsel Clause. Lessons learned under oppressive kings and colonial governors left the Framers with a keen appreciation for the need to protect criminal defendants from the power of the government. Their solution was to provide not "merely that a defense shall be made for the accused," *Faretta* v. *California*, 422 U.S. 806, 819 (1975), but that the defendant shall have the right to decide whether to defend himself through counsel and, if so, which counsel. And *this right* – as opposed to modern spin-offs such as the right to "effective" or conflict-free assistance of counsel – always has been defined and enforced for its own sake, irrespective of any objectively demonstrable prejudice arising from any particular violation.

1. Under English common law in the eighteenth century, only those charged with misdemeanors had a right to be represented by counsel at trial. See William M. Beaney, *The Right to Counsel in American Courts* 8-9 (1955). Parliament extended the right in 1695 to representation of those charged with treason. Treason Act of 1695, 7 & 8 Will. 3, c. 3, § 1 (Eng.). In the wake of this change, English courts began to allow limited representation in some felony trials, but the decision to do so remained completely within the discretion of the court and could not be demanded as a right. See Beaney, *supra*, at 9-11. However, two famous trials during the pre-Founding period – each of which was well-known to the Framers – highlighted the importance of choice of counsel as a means of protecting both a defendant's liberty and the public perception of fairness.

The first was the trial of the Seven Bishops in 1688. Seven leading bishops of England presented King James II with a petition announcing their refusal to follow the King's order that his Declaration of Indulgence be read at Sunday services in all churches throughout the kingdom. When the petition was publicized and nearly every church failed to comply with the order, the King resolved to prosecute the bishops for seditious libel and imprisoned them in the Tower of London. See 2 Lord Macaulay, *The History of England*

from the Accession of James II, at 990-1008 (Charles H. Firth ed., 1914).

With so much at stake, the Bishops retained an impressive team of lawyers to defend them. The Bishops chose their counsel with deliberate care. For example, they selected the junior counsel on the advice of friends who knew of his expertise in historical and constitutional questions and of his excellent reputation with the King's Bench. See Macaulay, *supra*, at 1022. One lawyer whom the Bishops sought to retain, Sir Creswell Levinz, was afraid of attracting the wrath of the King and initially refused their retainer. *Id.* at 1021-22. But so strong was the prevailing ethos regarding the right to counsel of choice that when the bar learned of Levinz's refusal, it quickly made clear to Levinz that the Bishops' choice was to be respected: "it [was] intimated to him by the whole body of attorneys who employed him that, if he declined this brief, he should never have another." *Id.* at 1022. Levinz's hesitation may even have prevented his restoration to the bench after the Glorious Revolution. *Id.* at 1022 n.1. Even though the Bishops had retained an army of other eminent lawyers, and even though Levinz may have had good cause to turn down the case, the bar united to protect the fundamental right of criminal defendants to choose counsel. No one suggested that the Bishops would have been just as well off with other equally distinguished lawyers; their choice had independent significance.

The second noteworthy trial took place in the American colonies. John Peter Zenger was tried before the Supreme Court of New York in 1735 for publishing a newspaper frequently critical of the governor. See generally James Alexander, *A Brief Narrative of the Case and Trial of John Peter Zenger* (Stanley N. Katz ed., 1972). Zenger engaged James Alexander and William Smith, prominent attorneys with experience defending against Governor Cosby's assertions of unlimited executive power. *Id.* at 4-5, 18. Alexander and Smith immediately challenged the commissions of two of the Supreme Court justices on several

grounds, insinuating that the justices were the governor's henchmen. *Id.* at 20. The Chief Justice, who had been recently elevated by the governor and whose commission was one of the two challenged, responded by disbarring Smith and Alexander. *Id.* at 4, 20. He likely resorted to this extraordinary punishment as a way to deprive Zenger of competent counsel, as Smith and Alexander were seen as the best of the small group of lawyers practicing in New York. *Id.* at 21. Indeed, the disbarment order had the marks of the governor, who sought to control both the bench and bar as a means to muzzle opposition. See Eben Moglen, *Considering Zenger: Partisan Politics and the Legal Profession in Provincial New York*, 94 Colum. L. Rev. 1495, 1515-16, 1519 (1994).

When Zenger then petitioned for appointed counsel, the court selected the "effective and well-trained" John Chambers. Moglen, *supra*, at 1519. Chambers was "a competent lawyer." Alexander, *supra*, at 21. Had he ultimately tried the case, Chambers would surely have met modern standards of effectiveness. See *id.* at 148. But he was also "a governor's man." *Id.* at 21; see also Moglen, *supra*, at 1516-17. And Zenger needed much more than minimally effective counsel because the contemporary law of seditious libel was squarely against him. Alexander, *supra*, at 23. Luckily for him, his friends engaged Andrew Hamilton, an out-of-state lawyer with an excellent reputation. *Id.* at 22. By sheer eloquence, and by following Alexander's original strategy, Hamilton convinced the jury to return a nullifying verdict, thereby dealing the governor's tyrannical power a severe blow. See *id.* at 23-26, 139; Moglen, *supra*, at 1518.

2. It was against this backdrop of governmental interference with counsel of choice that the new states legislated and constitutionalized the right to counsel after independence. Following the Declaration of Independence, nearly every former colony adopted provisions protecting a

criminal defendant's right to counsel.[3] The early constitutions of several of the states demonstrate the personal nature of the right to retain counsel of choice, as the founders perceived it: the constitutions of Pennsylvania (1776), Vermont (1777), Massachusetts (1780), and Delaware (1792) each provided that in all criminal prosecutions a defendant has the right to be heard by "*his* counsel." Beaney, *supra*, at 20-21 (emphasis added).[4] Within two generations, the General Court of Virginia clarified the meaning of the right when it held that in a criminal trial a minor possessed the same right as any adult to appear "by attorney of his *own selection*," and thus that a trial court had erred in appointing a guardian to defend the minor. *Word* v. *Commonwealth*, 30 Va. (3 Leigh) 743, 759 (1827) (emphasis added). The appellate court made no inquiry into the effectiveness of the guardian, or into whether the minor had suffered any demonstrable prejudice. The trial court's interference with the minor's right to control his own defense itself violated his common-law right. See *id.* at 748-49 (argument of amicus curiae on behalf of the minor).

The right to counsel, thus protected by the states, was among the rights the people demanded during ratification of the federal Constitution. Beaney, *supra*, at 22-23. The Sixth Amendment's "Assistance of Counsel" Clause responded to that cry. The thrust of the Clause was to guarantee the right to have defendants' chosen attorneys appear on their behalf.

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[3] See Beaney, *supra*, at 18-21. Prior to the Revolution, a few colonies recognized by statute or practice a right to counsel more generous than that of England. *Id.* at 16-18. As early as 1660, Rhode Island enacted a statute guaranteeing "the lawful privilege of any man that is indicted, *to procure* an attornye to plead any poynt of law that may make for the clearing of his innocencye." *Id.* at 17-18 (emphasis added).

[4] See Pa. Const. of 1776, Declaration of Rights, IX; Vt. Const. of 1777, ch. I, par. X; Mass. Const. of 1780, pt. I, art. XII; Del. Const. of 1792, art. I, § 7.

Once the lawyer appeared, there was no real question that the counsel would be able to "[a]ssist[]" in the defense. U.S. Const. amend VI.

Indeed, just one day before Congress proposed the Bill of Rights, President Washington signed the Judiciary Act of 1789, which provided in Section 35: "[I]n all the courts of the United States, the parties may plead and manage their own causes personally or by the assistance of such counsel or attorneys at law as by the rules of the said courts respectively shall be permitted to manage and conduct causes therein."[5] Mindful of the Zenger trial, Congress acted to secure criminal defendants' right to choose representation by any counsel admitted to practice before the federal courts, reflecting its views of the Sixth Amendment's guarantee.

3. State and federal courts repeatedly have reaffirmed that the original understanding of the Sixth Amendment and parallel state constitutional provisions was to guarantee defendants' right to obtain counsel of choice, irrespective of any prejudice that would result from denying that choice. In *Delk* v. *State*, 100 Ga. 61 (1896), for example, two codefendants, Tom Delk and Taylor Delk, were tried for murder. Although the trial court appointed a lawyer for each defendant, Taylor sought a continuance to allow counsel he had retained to appear. The trial court denied the request and forced both defendants to trial with their appointed lawyers. Both defendants were convicted and appealed, asserting violations of the right to counsel. The Georgia Supreme Court easily disposed of Tom's appeal, holding that his appointed attorney had ably represented him. *Delk* v. *State*, 99 Ga. 667, 669-71 (1896). But the same court took a different view of Taylor's appeal, holding that its state bill of rights provision that

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[5] See Act of Sept. 24, 1789, ch. 20, § 35, 1 Stat. 73, 92 (1789). The provision has remained on the books continuously since then, and is currently codified at 28 U.S.C. 1654 (2005).

> "every person charged with an offense against the laws of this State shall have the privilege and benefit of counsel," confers upon every person indicted for crime a most valuable and important constitutional right, and *entitles him to be defended by counsel of his own selection whenever he is able and willing to employ an attorney and uses reasonable diligence to obtain his services.* No [such] person * * * should be deprived of his right to be represented by counsel chosen by himself, or forced to trial with the assistance only of counsel appointed for him by the court.

Delk, 100 Ga. at 61 (emphasis added). The court thus reversed Taylor's conviction. *Ibid.* Unlike Tom's appeal, it made no inquiry into the effectiveness of Taylor's appointed counsel or into whether the trial would have gone differently had Taylor's retained counsel represented him.

Other state courts issued similar opinions over the years. The Supreme Court of Wisconsin observed that a defendant "may have [for his defense] whatever counsel he chooses to retain," *Baker* v. *State*, 56 N.W. 1088, 1089 (1893), while the Court of Appeals of Maryland noted in 1914 that "[i]t is, of course, the right of one accused of crime to be represented by counsel of his own selection," *McCleary* v. *State*, 89 A. 1100, 1103 (1914). In 1933, the New York Court of Appeals held that both the federal and New York Constitutions protect a defendant's "right to defend in person or by counsel of his own choosing," and consequently that the court had no authority to assign counsel to a defendant who retained his own. *People* v. *Price*, 187 N.E. 298, 299 (1933). The Appellate Division a few years later reversed a conviction where the trial judge refused to reasonably accommodate the schedule of the defendant's chosen counsel, and then appointed counsel after the defendant refused to retain another. *People* v. *Gordon*, 30 N.Y.S.2d 625 (1941). Emphasizing the "invasion of the substantial rights of the accused to appear by counsel of his own choosing," the court

made no inquiry into the effectiveness of the appointed counsel. *Id.* at 628.

Federal courts quickly followed suit as their jurisdiction over criminal matters grew. In *Powell* v. *Alabama*, this Court reversed the convictions of three of the Scottsboro Boys because the trial court's failure to allow them an opportunity to secure counsel of their own choice denied them due process, independent of the court's additional failure to appoint effective counsel for them. 287 U.S. 45, 52-53 (1932). This Court explained in plain terms: "It is hardly necessary to say that the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice." *Id.* at 53. This Court reiterated the importance of the right to choose counsel two decades later in *Chandler* v. *Fretag* when it reversed the conviction of a defendant denied a continuance to obtain a lawyer, observing that the defendant's "right to be heard through his own counsel was unqualified." 348 U.S. 3, 9 (1954).

In between these decisions, the Third Circuit relied on *Powell* to reverse the conviction of defendants whose chosen out-of-state counsel was improperly denied admission pro hac vice. *United States* v. *Bergamo*, 154 F.2d 31, 34 (CA3 1946). Although the case was "clearcut and simple" and the local counsel conducted it "with skill and competence," *id.* at 33, the Third Circuit nonetheless ordered a new trial because "[t]o hold that defendants in a criminal trial may not be defended by out-of-the-district counsel selected by them is to vitiate the guarantees of the Sixth Amendment." *Id.* at 35.

4. Even where Congress and the states had provided for counsel to be *appointed*, the defendant's choice historically was afforded great respect, further demonstrating that the right to assistance of counsel is about more than simply ensuring that some lawyer appear on the defendant's behalf. In Section 29 of the Federal Crimes Act of 1790, Congress provided that "the court before whom [any person indicted of treason or other capital offenses] shall be tried, or some judge

thereof, shall, and they are hereby authorized and required immediately upon his request to assign to such person *such counsel*, not exceeding two, *as such person shall desire*."[6] It was the practice of federal courts under this provision to appoint counsel chosen by the defendant. For example, in the famous second treason trial of John Fries (which became the subject of one of the articles of impeachment against Justice Samuel Chase in 1805), "the same persons who had conducted [Fries's] defence at his former trial, were again *at his request* assigned by the court as his counsel." *Case of Fries*, 9 F. Cas. 924, 936 (Cir. Ct. D. Pa. 1800) (Note 1, giving Justice Chase's answer to the first article of impeachment against him) (emphasis added). In a case near the close of the nineteenth century, this Court noted that a specific attorney "was assigned to [the defendant] as counsel upon his own request, and in accordance with [the Federal Crimes Act of 1790]," and that the defendant never requested the court to *assign* to him the other attorney that he claimed on appeal to have wanted. *Andersen* v. *Treat*, 172 U.S. 24, 29, 31 (1898).

Many states had similar statues and practices. South Carolina in 1731 and New Jersey in 1795 passed statutes with language very similar to the appointment provision of the Federal Crimes Act. See Beaney, *supra*, at 17, 20. More recently, on remand from this Court's landmark decision in

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[6] Act of Apr. 30, 1790, ch.9, § 29, 1 Stat. 112, 118 (1790) (emphasis added). This provision was reenacted as Rev. Stat. § 1034 (1873), and persisted well into the twentieth century, see 18 U.S.C. 563 (1940); *Bute* v. *Illinois*, 333 U.S. 640, 660 & n.16 (1948). The phrase "such counsel" indicates a degree of control in the selection of appointed counsel beyond mere number, as the act's language was clearly borrowed from the English Treason Act of 1695, which used virtually identical language to grant to those accused of treason the right to have appointed "such and so many Counsel, not exceeding Two, as the Person or Persons shall desire." 7 & 8 Will. 3, c. 3, § 1.

Gideon v. *Wainwright*, 372 U.S. 335 (1963), the trial court deferred to Gideon's preferences in appointing him counsel. Abe Fortas enlisted a prominent trial lawyer to represent Gideon on remand, and the prosecutor suggested that a public defender be appointed to assist in the defense. Yet Gideon asked for a particular local attorney instead. The trial judge quickly appointed the local attorney and rejected the other suggestions. Anthony Lewis, *Gideon's Trumpet* 237-38 (Vintage Books 1989). That the trial judge deferred to Gideon's choice shows the continued vitality of the original understanding that the assistance of counsel involved a defendant's choice and not simply the presence of some attorney at his trial.

B. Modern Legal Developments Have Not Altered The Basic Rule That A Trial Court Violates A Defendant's Right To Counsel Of Choice At The Moment It Erroneously Refuses To Allow A Defendant's Retained Counsel To Represent Him.

This Court's modern jurisprudence confirms that the right to counsel of choice does not depend on a defendant's ability to demonstrate a tangible adverse effect on the adversarial process. The right exists on its own terms and furthers goals above and apart from ensuring an objectively defined fair trial. To be sure, modern jurisprudence has clarified that the right to counsel of choice is not absolute and that the general right of assistance of counsel includes a right to "effective" assistance. But neither of these developments permits courts to deny defendants the ability to be represented by retained counsel of choice for no legitimate reason. Put another way, neither of these developments means that defendants improperly denied their requests to be represented by a particular retained counsel of choice must demonstrate some level of prejudice to make out a constitutional violation.

1. The Right To Counsel Of Choice Protects Interests Distinct From Merely Guaranteeing An Adversarial Process.

The right to counsel of choice serves three main functions, each of which has vitality independent of merely ensuring an objectively fair trial.

a. First and foremost, a defendant's counsel of choice is one of two entities (along with the jury) that the Constitution interposes in criminal cases between the accused and the government. The presence of these entities ensures that the people themselves have some say in whether the government may deprive individuals of their physical liberty. This Court has held, for example, that trial courts may not interfere with juries by "directing the jury to come forward with * * * a [guilty] verdict." *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 572-73 (1977). Juries, rather, must be allowed to perform their role as "circuitbreaker[s] in the State's machinery of justice." *Blakely* v. *Washington*, 542 U.S. 296, 306-07 (2004).

By the same token, forbidding the government from unjustifiably interfering with a defendant's ability to choose and retain an attorney ensures that the government may not exercise any form of supervisory veto over "the type of defense [the defendant] wishes to mount." *United States* v. *Laura*, 607 F.2d 52, 56 (CA3 1979). Cf. *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617, 646 (1989) (Blackmun, J., dissenting) (counsel of choice ensures "equality between the Government and those it chooses to prosecute"). It also ensures that the government may not cause a defendant to question the "trust between attorney and client that is necessary for the attorney to be a truly effective advocate." *Caplin & Drysdale*, 491 U.S. at 645 (Blackmun, J., dissenting). Once the government, at its whim, could disqualify a defendant's chosen attorney, a defendant would be bound to be suspicious of any lawyer whom the government allowed to stay in a case.

b. A related "primary purpose" of the Sixth Amendment right to counsel of choice "is to grant a criminal defendant effective control over the conduct of his defense" as a means of respecting the constitutional values of individual dignity, autonomy, and free will. *Wheat*, 486 U.S. at 165-66 (Marshall, J., dissenting); see also *McKaskle* v. *Wiggins*, 465 U.S. 168, 176-77 (1975) (noting the importance of affirming "the dignity and autonomy of the accused"). Defending oneself against criminal charges is a traumatic and deeply personal endeavor. It involves innumerable choices about how to vindicate one's interests. Defendants therefore must be allowed to select the attorney who will help them make those choices, so long as defendants' selections fall within accepted limits. "Our system of laws generally presumes that the criminal defendant, after being fully informed, knows his own best interests and does not need them dictated by the State. Any other approach is unworthy of a free people." *Martinez* v. *Court of Appeal of Cal.*, 528 U.S. 152, 165 (2000) (Scalia, J., concurring).

It is, after all, the accused "who suffers the consequences if the defense fails." *Faretta*, 422 U.S. at 819-20. So just as the government may not unjustifiably interfere with a defendant's right to represent himself, the federal courts of appeals have held that it may not unjustifiably interfere with his free choice of counsel. See, *e.g.*, *United States* v. *Panzardi Alvarez*, 816 F.2d 813, 818 (CA1 1987) ("Obtaining reversal for violation of [the right to counsel of choice] does not require a showing of prejudice to the defense, since the right reflects constitutional protection of the defendant's free choice independent of concern for the objective fairness of the proceedings." (citation omitted)); *Wilson* v. *Mintzes*, 761 F.2d 275, 279 (CA6 1985) ("[R]ecognition of the right [to counsel of choice] also reflects constitutional protection of the accused's free choice independent of these [fairness] concerns."); *United States* v. *Curcio*, 694 F.2d. 14, 25 (CA2 1982) (Friendly, J.) ("[T]he defendants' choice is to be honored out of respect for them as free and rational beings,

responsible for their own fates"), disapproved on other grounds in *Flanagan* v. *United States*, 465 U.S. 259, 263 n.2 (1984). If a trial court does so, the court violates the Sixth Amendment regardless of whether an objective observer would believe the court's actions undermined the adversarial process.

The case of Euel Lee illustrates why this is so. See *In re Ades*, 6 F. Supp. 467 (D. Md. 1934). Lee was a black man whom the State of Maryland had charged with robbing and murdering a white family. *Id.* at 469-70. Lee was nearly lynched several times. *Id.* at 471. The International Labor Defense commissioned a young lawyer named Bernard Ades to defend Lee. *Id.* at 470. Ades shared his client's "not commonly held" belief that "it is difficult for a colored person charged with a major crime against a white person to get a fair and impartial trial." *Id.* at 470, 474. Accordingly, Ades sought removal of the case from the prejudiced officials and public of the Eastern Shore and demanded that blacks be included in the jury. *Id.* at 471. Meanwhile, the trial court appointed F. Leonard Wailes, a "leading lawyer of the state," to jointly represent Lee. *Ibid.* Wailes disagreed with both of Ades' arguments, and tried to have him removed as counsel. *Id.* at 472. Lee and Ades ultimately resisted this gambit and continued to seek a change of venue and nondiscriminatory jury selection, neither of which his establishment-appointed counsel had thought worthwhile or prudent. *Id.* at 473-74. Although an appellate court likely would not have ruled that precluding Ades from representing Lee would have constituted ineffective assistance, Ades's arguments ultimately prevailed and secured Lee's rights.

c. Finally, the right to counsel of choice serves an important institutional role: When the government unjustifiably interferes with the accused's retained counsel, the government "creates an appearance of impropriety that diminishes faith in the fairness of the criminal justice system in general." *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 811 (1987) (plurality opinion). "[J]ustice

must satisfy the appearance of justice." *Offutt* v. *United States*, 348 U.S. 11, 14 (1954); see also *United States* v. *Olano*, 507 U.S. 725, 736 (1993) (reaffirming the need to correct error that "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings" (citation omitted)). Accordingly, *Wheat* itself recognized that a defendant's choice of counsel implicates the judicial system's interest in ensuring that criminal trials are conducted "just[ly]" and in a manner that "appear[s] fair to all." 486 U.S. at 160. These values are harmed whenever a court, for no legitimate reason, bars a defendant's chosen counsel from appearing on his behalf. Under these rare and extreme circumstances, it is not only the defendant who is led to "believe that the law contrives against him," *Faretta*, 422 U.S. at 834; the public also naturally doubts whether an ensuing conviction is legitimate and impartial. When, as here, the prosecution itself plays a role in blocking the defendant's chosen counsel, see *supra*, at 7, this public harm is only exacerbated.

2. None Of The Sixth Amendment Doctrines That Look More Generally To The Adversarial Process Suggests That In The Context Of This Case Any Showing Of Prejudice Should Be Required To Make Out A Constitutional Violation.

The right to assistance of counsel, of course, is not absolute. A court may reject chosen counsel in order to *protect* overriding interests in a fair, adversarial process. A court also may reject claims of "ineffective assistance" when there is no evidence of prejudice to adversarial process. But, contrary to the government's argument, neither of these doctrines dictates that a trial court may reject a defendant's retained and legitimate counsel so long as no objectively demonstrable harm to the accuracy of the verdict occurs.

a. A trial court's ability to ensure that a defendant's choice of counsel is legitimate and nondisruptive does not grant it a concomitant power to reject legitimate counsel for

mistaken or illegitimate reasons. Courts may limit representation to those who are attorneys and who are eligible to practice in the jurisdiction. In order to protect the efficiency or integrity of the judicial process, courts also may refuse repeated, unreasonable, or abusive requests for continuances even if this prevents a defendant from proceeding with his chosen counsel. See *Ungar* v. *Sarafite*, 376 U.S. 575, 588-89 (1964). Courts may also reject conflicted counsel in order to promote the fairness of a trial, the ethical standards of the legal profession, and the appearance of propriety.

This Court addressed this last constellation of concerns in *Wheat*. There, a defendant had sought to be represented by an attorney who was already engaged by co-defendants and potential witnesses, presenting a serious risk of a conflict of interest. 486 U.S. at 155-56, 163-64. Although this Court recognized the defendant's presumptive right to be represented by his preferred attorney, *id.* at 160, it concluded that the trial court acted within its discretion in forbidding the attorney from representing the defendant. This Court explained that the defendant's interest in choosing his counsel had to give way to the "institutional interest in the rendition of just verdicts," – the interest of "[f]ederal courts * * * in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all." *Ibid.*

But when, as here, there are no such countervailing interests, the Sixth Amendment entitles a defendant to be represented by his chosen attorney. Once a defendant selects a proper attorney, his right to counsel of choice attaches. If the trial court erroneously denies the choice, it is not necessary to wait and see how the trial progresses to know whether the court has violated the Constitution.

Put another way, the government's references to *Wheat* and related cases confuse the circumstances under which the right to counsel of choice may properly be overcome with the

appropriate remedy when it is improperly denied. The Sixth Amendment contains a series of rights designed to ensure that a defendant receives a fair and adversarial trial, such as the right to know the charges against him, to confrontation, and to compulsion of witnesses, see *Faretta*, 422 U.S. at 818, as well as the right to have counsel present at all critical stages, see *United States* v. *Cronic*, 466 U.S. 648, 659 (1984). Many of these rights are subject to limitations when that is necessary to allow the adversarial process to run efficiently and fairly. See, *e.g.*, *Perry* v. *Leeke*, 488 U.S. 272 (1989) (allowing courts to deny access to counsel during recess between direct examination and cross-examination in order to further the truth-seeking function of trial); *Taylor* v. *Illinois*, 484 U.S. 400, 414-15 (1988) (allowing courts to limit compulsory process as a sanction in order to preserve the "integrity of the adversary process"); *Delaware* v. *Van Arsdall*, 475 U.S. 673, 679 (1986) (allowing courts to limit cross-examination "based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant"). Yet none of these rights requires a defendant who has been *improperly* prevented from taking certain action to show prejudice in order to make out a constitutional violation. The same logic holds here.

Reduced to its essence, the government's argument is a familiar one: that the constitutional right at issue exists to ensure a "fair trial," so that if the defendant received a fair trial, the right cannot have been violated. Petr. Br. 13. But even putting aside that the right to counsel of choice serves constitutional interests above and apart from merely ensuring a fair trial, see *supra*, at 21-25; *infra*, at 39-41, the government's argument "abstracts from the right to its purposes and then eliminates the right." *Maryland* v. *Craig*, 497 U.S. 836, 862 (1990) (Scalia, J., dissenting). The whole point of including the Assistance of Counsel Clause in the Constitution was to single out the right to counsel of choice as one of the select few to which defendants are entitled without

having to make any specific showing of need. Saying that the right is not violated unless the defendant will suffer (or has suffered) prejudice "is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." *Crawford* v. *Washington*, 541 U.S. 36, 62 (2004).

Indeed, if the government were correct that the right to counsel of choice is not violated unless a defendant can make a sufficient showing of prejudice to the adversarial process, Petr. Br. 16, nothing would limit that rule to scenarios in which the defendant went to trial with his "second choice" counsel. The same rule would apply when, as apparently happened here, the defendant's lack of additional resources required him go to trial simply with local counsel who was never intended to be the lawyer standing before the jury at trial; or when a defendant went to trial with a lawyer who was demonstrably something other than second-best. A court could even force a defendant to go to trial with *the court's* preferred lawyer so long as that lawyer was by some measure supposedly just as good as the one the defendant wished to retain. If all that matters is whether the adversarial process is objectively undermined, the identity and source of the defendant's ultimate attorney are irrelevant.

The government tries to stem the import of this logic by saying that, even under its proposed prejudice rule, "[t]he District Court must recognize a presumption in favor of [defendants'] counsel of choice," *Wheat*, 486 U.S. at 164, and that the district court will screen defendants' selection of counsel "conscientiously and in good faith." Petr. Br. 30. "The Framers, however, would not have been content to indulge this assumption. They knew that judges, like other government officers, could not always be trusted to safeguard the rights of the people." *Crawford*, 541 U.S. at 67. Indeed, John Peter Zenger would find little comfort in the government's assurance, nor would any colonist with memory of "the cringing Attorneys-General and Solicitors-General of the Crown and the arbitrary Justices of the King's Court, all

bent on the conviction of those who opposed the King's prerogatives, and twisting the law to secure convictions." Charles Warren, *A History of the American Bar* 7 (1911). The only way to make sense of the "presumption" in *Wheat* is to recognize that the Sixth Amendment requires courts to accept a defendant's chosen counsel unless there is a legitimate reason for precluding the representation.

b. Nor does the modern recognition of a right to "effective" assistance of counsel make the right to counsel of choice dependent on whether trials turn out to be sufficiently adversarial in nature. The right to effective assistance is an implied right, emanating from an overall purpose of the Sixth Amendment, whereas the right to counsel of choice is the core concept protected by the Assistance of Counsel Clause. See, *e.g.*, Note, *Legislation: The Right to the Benefit of Counsel Under the Federal Constitution*, 42 Colum. L. Rev. 271, 272, 282 (1942) (concluding that "[o]ne of the *most important* aspects of the right to counsel is the opportunity to obtain counsel of one's own choice," while observing that "[t]he right to counsel has *begun* to mean the right to have effective assistance of counsel" (emphasis added)).

To be sure, in the decades since *Johnson* v. *Zerbst*, 304 U.S. 458 (1938), and *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) (construing the Assistance of Counsel Clause and the Due Process Clause to require appointment of counsel for the vast majority of criminal defendants who cannot afford retained counsel) – and especially since this Court's decisions in *McMann* v. *Richardson*, 397 U.S. 759 (1970), and *Strickland* v. *Washington*, 467 U.S. 1267 (1984) (construing the Sixth Amendment to require effective assistance) – claims of ineffective assistance by appointed counsel have dominated right-to-counsel litigation. This may explain the government's assertion that effectiveness is the "fundamental" right protected by the Assistance of Counsel Clause. Petr. Br. 14. But it does not make the assertion true. The right to counsel of choice always has formed the foundation of the Assistance of Counsel Clause, and no

amount of litigation concerning other aspects of the Clause can change that.

Indeed, the government's proposal that a defendant should have to prove that his substitute counsel was "ineffective" under *Strickland* to establish a violation of his right to counsel of choice, see Petr. Br. 14, would collapse the historic right of counsel of choice into the modern right to effective assistance. Not only would this turn the Sixth Amendment utterly inside-out; it also, as the Seventh Circuit has observed, "would have the practical effect of eliminating relief in all cases when the defendant loses his preferred lawyer, and thus of making *Wheat* a dead letter." *Rodriguez* v. *Chandler*, 382 F.3d 670, 675-76 (2004), cert. denied, 543 U.S. 1156 (2005). To make the point concrete, a court could arbitrarily refuse to allow a defendant to be represented by a modern-day Clarence Darrow, and so long as the defendant's substitute counsel were not constitutionally incompetent, the court would not violate the Constitution. Cf. Petr. Br. 16.

C. Practical Considerations Require Treating Unjustified Denials Of Counsel Of Choice As Complete Constitutional Violations.

The government's proposed re-conception of the right to counsel of choice falters not only in theory, but also in practice. A rule requiring defendants to prove prejudice in order to establish a violation of the constitutional right to counsel of choice would be nearly impossible for trial courts to administer and extremely costly and inefficient for appellate courts to police. Furthermore, the government's rule would instigate more disqualification litigation in order to solve a problem that simply does not exist: namely, defendants being denied their counsel of choice and then getting *better* counsel instead and obtaining outstanding results.

1. As an initial matter, the government's proposed rule is incompatible with the reality that trial courts must make decisions concerning a defendant's right to proceed with

counsel of choice at the threshold of the case. As a result, the prejudice standard creates a series of bizarre incentives that no constitutional rule should encourage. First, any rule that permits unjustified denials of a defendant's chosen counsel unless the defendant can show prejudice after the fact will unduly encourage attorney disqualification motions. Knowing that a denial of counsel of choice will result in reversal only if the defendant can persuade an appellate court, at the very least, that his substitute lawyer "pursued a different defense strategy that would have created a reasonable probability that * * * the result of the proceeding would have been different," Petr. Br. 15-16 (quotation omitted), overzealous prosecutors may be tempted to initiate disqualification proceedings in the hopes of removing particularly effective defense lawyers. See *Richardson-Merrell, Inc.* v. *Koller*, 472 U.S. 424, 436 (1985) (expressing "concern about [the] 'tactical use of disqualification motions' to harass opposing counsel" (citation omitted)).

Although this Court in *Wheat* shelved the possibility of prosecutors "manufactur[ing]" attorney conflicts of interest, 486 U.S. at 163, the government's proposal here raises far more acutely the possibility of abusive disqualification motions. Instead of having to manufacture a conflict of interest, the government would now be free to advance *any* reason – *e.g.*, a supposed breach of an ethical rule – to remove defense counsel from a case, and still remain insulated from an appellate rebuke. In fact, under the government's conception of the right to counsel of choice, even a disqualification on the grounds that the defendant's counsel "parts his hair on the right" would not alone amount to a constitutional violation or entitle the defendant to any remedy. *United States* v. *Santos*, 201 F.3d 953, 960 (CA7 2000). This Court should not backhandedly encourage such baseless objections to defendants' chosen counsel.

2. By focusing on the potential prejudice of substitute counsel, the government's proposed rule also pushes judges to grant motions to disqualify counsel of choice. When

considering whether to disqualify a defendant's chosen counsel before trial, the judge "must carefully balance the defendant's right to be represented by the counsel of his choice against the court's interest in 'the orderly administration of justice.'" Pet. App. 7a (citations omitted). While performing this balancing, the judge should consider only the defendant's interest in retaining his chosen counsel against the lawyer's qualifications and the risk he will be ineffective or otherwise undermine the adversarial process. See *Wheat*, 486 U.S. at 164. However, because the thrust of the government's position emphasizes whether *substitute* counsel will be effective, the standard creates an incentive for judges to discount the defendant's interest in retaining his chosen counsel. If, as is typically the case, there is little risk that substitute counsel will be constitutionally incompetent,[7] the government's standard encourages the judge to disqualify chosen counsel because the substitute lawyer's performance will foreclose any constitutional violation from arising.[8]

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[7] Because the *Strickland* prejudice standard is difficult to prove, most substitute counsel will be found at least minimally effective under the government's approach, creating little risk for judges to err on the side of disqualifying defendants' chosen counsel.

[8] The rules under which judges may be asked to consider attorney disqualification motions or motions to appear pro hac vice may exacerbate this problem because they give judges so little guidance. In the present case, the local rule under which the district court denied Low's pro hac vice motions gave the judge unbounded discretion. The rule provides without any further substantive elaboration that:

> An attorney who is not regularly admitted to the bar of this Court, but who is a member in good standing of the bar of the highest court of any state or the District of Columbia, may be admitted pro hac vice for the limited purpose of appearing in a specific pending action.

The government's proposed rule also would place defendants such as respondent in an unfair predicament. If a defendant is confident that an appellate court will realize that the trial court erred in disqualifying his counsel of choice, the best way for him to obtain a new trial with his original counsel would be to hire an utterly incompetent substitute attorney for the instant trial. Only then could the defendant be assured that he could make out a constitutional violation and obtain a reversal on appeal. If, however, the defendant is more risk averse – and virtually all defendants will be – he may try to obtain the best possible substitute counsel and urge that counsel to follow the same basic strategy as his original counsel would have planned. Yet if the defendant is then convicted, he stands almost no chance of obtaining reversal on appeal even if the original lawyer would have pursued the strategy more expertly. The government has provided no reason for this Court to adopt a rule that puts defendants in such a bind and encourages them effectively to invite one error in order to allow them to seek a cure for another.

The government's proposed prejudice standard would place defendants interested in plea bargains in even worse positions. Many defendants, such as those who have been "overcharged" by the government, retain a particular lawyer for his skill in negotiating favorable deals with the government, either because of his tenacity or because of his established relationship with the prosecutor's office. For such a defendant whose retained counsel is wrongfully disqualified, the government's prejudice standard would create an unacceptable dilemma, for he would be unable to plead guilty with substitute counsel if he wishes to challenge the wrongful disqualification of his counsel of choice. Under the government's standard, a defendant who pleads guilty with substitute counsel would need to meet the requirements

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E.D. Mo. Local Rule 83-12.01(E). Thus, the rule never expressly requires the court to consider a defendant's Sixth Amendment interests at all in deciding whether to grant the motion.

set forth in *Hill* v. *Lockhart*, 474 U.S. 53 (1985), to prove prejudice from the denial of his counsel of choice. However, because the defendant hired his first counsel with the possibility of pleading in mind, he would be unable ever to prove that, but for substitute counsel, "he would have pleaded not guilty and insisted on going to trial." *Id.* at 60. Even if the defendant would have gotten a substantially better plea agreement if he had proceeded to the bargaining table with his chosen counsel, he would not satisfy *Hill*'s standard. Thus, defendants who would have been willing to plead guilty to reduced charges would either be forced to go to trial with substitute counsel, in the hopes of eventually obtaining a new proceeding with counsel of choice, or they would be backed into forfeiting their constitutional right to counsel of choice and accepting a guilty plea negotiated by substitute counsel.

3. The government's position also would generate a new type of habeas litigation. In *Flanagan*, 465 U.S. at 260, this Court held that "a District Court's pretrial disqualification of defense counsel in a criminal prosecution is not immediately appealable under 28 U.S.C. § 1291." Nor, under the government's conception of the right to counsel of choice, would such claims often be cognizable on direct appeal. If defendants would have to show prejudice related to trial strategy, they would have to produce new evidence outside the record of the trial that actually occurred. Accordingly, as the government acknowledges, Petr. Br. 23 n.6, requiring defendants to show prejudice will necessitate post-conviction evidentiary proceedings, thereby forcing defendants' claims of improper denial of counsel of choice into habeas litigation. This will require defendants to wait years for relief and will enlarge the already crowded habeas docket.

This resultant increase in habeas review is particularly startling because the government argues that requiring a rule of automatic reversal would lead to burdensome government expenditures from the costs of new trials. See Petr. Br. 31. But the cost to the government for a new trial may well be similar to that of an evidentiary hearing on federal habeas

review. According to the government's own data, the majority of criminal trials in federal district court in 2003 lasted for one day. U.S. Dep't of Justice: Office of Justice Programs, *Sourcebook of Criminal Justice Statistics 2003* 455-56 Tb. 5.42, *available at* sourcebook/ pdf/t542.pdf.[9] If an evidentiary hearing on federal habeas corpus would also last for a single day – an entirely plausible assumption, because the defendant would have to detail the differences between counsel, the changes in representation caused by the substitution of counsel, and the effects on the original outcome to a judge who did not preside over the original trial – then the government's argument that a new trial would pose a significant burden on the federal judicial system holds little weight.

Further, an evidentiary hearing on the denial of a convicted defendant's counsel of choice will present greater complications than those seen in *Strickland* inquiries. In ineffectiveness claims, the reviewing court compares the lawyer's performance with a baseline standard of objective reasonableness. See *Strickland*, 466 U.S. at 687-90. Under the government's conception of the right to counsel of choice, however, the habeas court would have to compare replacement counsel's performance, a known quantity, with a complete unknown – the planned strategy and performance of chosen counsel. The chosen attorney apparently would be forced to testify not only about the errors the substitute counsel committed, but also about his original philosophy of the case, his proposed defense strategy, and how he would have questioned witnesses. In addition, trial witnesses, who might claim Fifth Amendment privilege, would need to be deposed in an attempt to glean how they might have testified

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[9] According to the Sourcebook, in 2003, there were 7,118 criminal trials in U.S. district courts across the country. Of these, 3,586 spanned one day, 1,196 trials lasted for two days, 860 for three days, and 1,221 for four to nine days. Only 255 trials lasted for ten or more days.

under the chosen counsel's strategy. The government would then need to determine, and demonstrate to the court, how it would have responded to the chosen lawyer's strategy and persuade the court that the outcome would nonetheless probably have been the same.[10] This series of complicated and entirely speculative inquiries and the trial-within-a-trial they would necessitate demonstrates the nearly impossible task given to reviewing courts under the government's proposed standard.

4. The final striking aspect of the government's proposed prejudice rule is that it is designed to solve a supposed problem that does not exist. It is exceedingly rare nowadays for a trial court, as here, to wrongly deny a defendant his right to proceed with counsel of choice, and it does not appear that any of the handful of modern defendants to suffer this kind of action have received windfalls at their trials. Requiring the government to re-try the occasional defendant who is improperly denied his counsel of choice is a modest burden, compared to the load those defendants might bear if forced to spend years in prison after being denied their right to present their defenses as they wanted.

All of this stands in stark contrast to *Strickland*. There, this Court explained that a prejudice rule was necessary because "the availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges." *Strickland*, 466 U.S. at 690. In a world where ineffectiveness claims were easy to prove, nearly "all criminal trials resolved unfavorably to the defendant

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[10] And the process would create a perverse consequence: either the habeas hearing would have to be held *ex parte* or the government would learn, through the hearing, the entire strategy the defendant would use at retrial, thereby entitling itself to a form of discovery to which it is generally not entitled and that could well undermine the efficacy of the strategy at the second trial if one were ordered.

would increasingly come to be followed by a second trial" on the question of the first counsel's ineffective performance. *Ibid.* As a result, this Court worried that a defendant-friendly test for ineffective assistance would deter lawyers from representing criminal defendants. *Ibid.* In large part because of the weight of these concerns, the *Strickland* Court adopted a test that, while often asserted, has been extremely difficult for criminal defendants to satisfy.[11]

But while any convicted defendant can claim on appeal that his lawyer was ineffective, defendants can claim wrongful denials of counsel of choice only when (a) they retained counsel in the first place and (b) the trial court disqualified that chosen counsel. And even within this group, *Wheat*'s rule of deference means that most disqualifications will be upheld on appeal. 486 U.S. at 163. A Westlaw search produced only sixteen cases during the last fourteen months nationwide in which non-indigent defendants in federal court have even claimed a violation of their right to counsel of choice; only two, including respondent, succeeded.[12] Thus, the risk that defendants who are well represented and who fare well at trial will assert violations of their right to counsel of choice and prevail on such claims is entirely illusory. Some federal circuits have had automatic reversal rules for years,[13] yet the government is unable to cite a single actual

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[11] As has been widely noted, while there is a large amount of litigation in which defendants claim ineffective assistance of counsel, "very few of these cases result in reversal, and those few convictions that are reversed are subject to retrial." Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard*, 88 J. Crim. L. & Criminology 242, 281 (1997).

[12] Respondent searched for all cases using the terms "right" and "counsel of choice" in the "All-Feds" database that were reported from Dec. 31, 2004, to Mar. 13, 2006. Respondent's search found 109 cases, and only sixteen were on point.

[13] See *United States* v. *Voigt*, 89 F.3d 1050, 1074 (CA3 1996), cert. denied, 519 U.S. 1047 (1996); *United States* v. *Childress*, 58

case in which a defendant has received a windfall on appeal. See Petr. Br. 16-17 (creating hypotheticals to show supposed "anomalies" produced under current law).

II. The Court Of Appeals Correctly Held That The Proper Remedy For The Trial Court's Sixth Amendment Violation In This Case Is A New Trial.

This Court has developed two categories of constitutional errors – trial errors and structural violations – the designation of which plays a significant role in the remedy available for redress. See *Arizona* v. *Fulminante*, 499 U.S. 279, 280 (1991). Trial errors, because they occur during the presentation of evidence, may be assessed for their effect on the fact-finder's determination of guilt. *Ibid.* Consequently, they are subject to harmless error review under *Chapman* v. *California*, 386 U.S. 18 (1967). See *Fulminante*, 499 U.S. at 280. Structural errors, on the other hand, constitute "defects in the constitution of the trial mechanism" that implicate the very heart of the trial itself. *Ibid.* Thus, they "defy analysis by harmless-error standards." *Ibid.*

As the First, Third, Sixth, Ninth, Tenth, and D.C. Circuits – along with the Eighth Circuit below – all have held without dissent, an unjustified denial of counsel of choice constitutes structural error.[14] But even if it did not, respondent still would be entitled to a new trial because of the deleterious

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F.3d 693, 736 (CADC 1995), cert. denied, 516 U.S. 1098 (1996); *Bland* v. *Cal. Dep't of Corrs.*, 20 F.3d 1469, 1478 (CA9 1994), cert. denied, 513 U.S. 947 (1994), overruled on other grounds by *Schell* v. *Witek*, 218 F.3d 1017 (CA9 2000); *United States* v. *Mendoza-Salgado*, 964 F.2d 993, 1015-16 (CA10 1992); *Panzardi Alvarez*, 816 F.2d at 818; *Mintzes*, 761 F.2d at 285-86.

[14] See Pet. App. 16a; *Voigt*, 89 F.3d at 1074; *Childress*, 58 F.3d at 736; *Bland*, 20 F.3d at 1478; *Mendoza-Salgado*, 964 F.2d at 1015-16; *Panzardi Alvarez*, 816 F.2d at 818; *Wilson*, 761 F.2d at 285-86.

effect that the error here had on his ability to advance his best possible defense.

A. An Unjustified Denial Of Counsel Of Choice Is Structural Error.

Within the category of structural errors, there are two primary types of constitutional violations. First, as this Court explained in *Faretta* v. *California*, 422 U.S. 806 (1975), constitutional violations that implicate values that go beyond ensuring a "correct" trial outcome, such as the right to self-representation, may be considered structural errors. Second, there are some errors that are so fundamental to the course of the entire trial that their effects pervade the whole proceeding, making any attempt to isolate and assess the effects of these errors nearly impossible. See *Neder* v. *United States*, 527 U.S. 1, 8-9 (1999). The erroneous denial of retained counsel of choice satisfies each of these tests. It is a structural error requiring automatic reversal because it implicates values of personal autonomy that reach beyond ensuring "proper" trial outcomes. In addition, because the choice of counsel pervades the entire proceeding, a wrongful denial of counsel of choice is structural error because its effects cannot be distilled from the proceedings as a whole.

1. The right to counsel of choice implicates essential interests of personal autonomy and freedom of choice that go beyond pursuit of the "correct" verdict. This Court has explained that the Sixth Amendment "grants to the accused personally the right to make his defense." *Faretta*, 422 U.S. at 819. This acknowledgement comports with the reality of a criminal trial, where the defendant's own life and liberty are at stake. See *id.* at 819-20. It also accords with the more fundamental notion that respect for the individual and his ability to make choices affecting his own destiny is "the lifeblood of the law." *Id.* at 834 (quoting *Illinois* v. *Allen*, 397 U.S. 337, 350-51 (1970) (Brennan, J., concurring)).

Because of this need to respect personal autonomy, this Court has held that denying a defendant's right to self-

representation constitutes structural error. The right to self-representation reflects a profound judgment about the value of individual dignity and free will. Even if an appellate court believes that proceeding pro se would have undermined a defendant's chances of acquittal, it must reverse any conviction obtained in violation of this right, in order to "protect [these] important values that are unrelated to the truth-seeking function of the trial." *Fulminante*, 499 U.S. at 295 (quoting *Rose* v. *Clark*, 478 U.S. 570, 587 (1986)). See also *McKaskle*, 465 U.S. at 176-77; *Faretta*, 422 U.S. at 834.

A defendant's right to counsel of choice reflects the same values and should receive the same treatment. Just as the defendant's wish to conduct his defense personally through self-representation must be honored, so too must a defendant's decision to hire a particular lawyer who is willing to represent him. Such respect for personal autonomy has no lesser weight when the individual chooses an advocate to be his voice in the courtroom than when he chooses to speak for himself. This is especially so when, as here, a defendant declines to testify at trial – making his attorney his *only* voice in the courtroom.

This case provides a particularly vivid example of the need to respect a defendant's free choice concerning the way he wishes to present himself to the court and the jury. Even putting aside for the moment the differences in skill levels and strategy between Low and Dickhaus, the two attorneys embodied drastically different defense choices. Low was an out-of-town attorney with no significant local relationships. His *modus operandi* is to attack the government and to seek effective resolution through the force of his litigation tactics. Dickhaus, on the other hand, was a local lawyer who had relationships with the judge and the prosecuting attorneys. His method of representing respondent was bound to be more tentative and conciliatory. The point is not to say which attorney's approach is better in the abstract, for it is impossible to say. The point is that respondent should have been allowed to choose which approach he thought would

best suit him. In denying that right, the district court affronted respondent's dignity and his dominion over the nature of his defense.

2. The right to counsel of choice also merits treatment as structural error because its effects pervade the entire criminal proceeding, making any harmless-error review an unacceptably speculative exercise. The defendant's initial selection of counsel is immeasurably important because it largely determines the course of the proceedings, from the nature of the attorney-client relationship to the decision whether to seek or accept a guilty plea; to the defense theory of the case; to the style of presentation to the fact-finder; and finally, to the skill with which the government's case is tested. Accordingly, while the government intimates that representing a criminal defendant is a color-by-numbers exercise that almost any effective lawyer will do the same way, the reality is that "lawyers are not fungible, and often 'the most important decision a defendant makes in shaping his defense is his selection of an attorney.'" *Mendoza-Salgado*, 964 F.2d at 1014-15 (citations omitted). See also Brief *Amicus Curiae* of the National Association of Criminal Defense Lawyers in Support of Respondent (detailing the wide range of stages at which attorneys' approaches will differ).

The choice of counsel affects the whole course of the trial in large part because of the unique nature of the attorney-client relationship. When a defendant chooses a lawyer, his counsel becomes his "alter ego." George C. Thomas, *History's Lesson for the Right to Counsel*, 2004 U. Ill. L. Rev. 543, 555. And from the first moments of representation, "an attorney's duty is to take professional care for the conduct of the case, after consulting with his client." *Jones* v. *Barnes*, 463 U.S. 745, 753 (1983). See also *Florida* v. *Nixon*, 543 U.S. 175, 190-91 (2004) (confirming that the lawyer has great latitude in choosing the best defense strategy); *Taylor* v. *Illinois*, 484 U.S. at 418 (stating that "the lawyer has – and must have – full authority to manage the conduct of the

trial"). By infusing his right to make his own defense in the person of his lawyer, a defendant places his fate and future in the hands of his attorney.

The practical implications that flow from the nature of the attorney-client relationship permeate the trial. One of the most obvious manifestations is the language used in our criminal courtrooms, where those present "often [refer] to what counsel does as if the defendant had done it personally." Thomas, *supra*, at 559. The court refers to the lawyer's words as the client's own precisely because the lawyer is primarily responsible for tactical decisions and the presentation of evidence at trial. "[T]he adversary process could not function effectively if every tactical decision required client approval." *Taylor* v. *Illinois*, 484 U.S. at 418. The jury also often comes to equate defendants with their counsel, basing its views concerning the defendant's credibility and character on its assessment of his attorney.[15]

A criminal trial, like a play, is a form of public performance at which a story is presented, and shaping that performance is an "art," not a science. *Strickland*, 466 U.S. at 689. A trial attorney functions like a director, molding the proceeding in innumerable ways, some immediately apparent and some not. If one imagines all of the ways that a specific director affects the way a given Shakespearean tragedy can be presented, one can begin to appreciate the ways in which a choice of attorney infiltrates every aspect of a trial. In a Shakespearean play, a director will inherit a basic narrative but will choose to emphasize some themes and downplay others; to highlight some scenes and to omit others; and to give the play a certain persona. A particular criminal attorney

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[15] For a discussion of a similar effect in the jury's perception of the prosecution's case, see Tom R. Tyler, *Viewing CSI and the Threshold of Guilt: Managing Truth and Justice in Reality and Fiction*, 115 Yale L.J. 1050, 1079 (2006) (arguing that a jury's assessment of the prosecution's success in proving guilt beyond a reasonable doubt depends in part on its trust for the prosecutors).

likewise will emphasize certain themes and not others; will call certain witnesses and not others; and will strike a certain personal tone. And that is just the beginning: the manner in which the attorney tells the client's story "become[s] a psychological filter – the evidence introduced at trial passes through it." Jeffery P. Robinson, *Opening Statements Become Opening Stories*, The Champion, Mar. 2006, at 18.

Furthermore, just as in the context of a play, it is often impossible to decide objectively whether certain choices were "better" than potential alternate routes. There is a "wide range of reasonable professional assistance" that an attorney can deliver in any given proceeding. *Strickland*, 466 U.S. at 688; *Yarborough* v. *Gentry*, 540 U.S. 1, 6 (2003) (noting the "broad range of legitimate defense strategy" for closing argument). Even with the benefits of hindsight, it is foolhardy to think one could unwind a criminal prosecution and predict whether it would have progressed towards a different result with a different attorney at the helm. A defendant's initial choice of counsel "infects the entire trial process," *Neder*, 527 U.S. at 8 (citations omitted) – even the pretrial process – and cannot be separated from the trial itself.

This conclusion is reinforced by the Court's decision in *Holloway* v. *Arkansas*, 435 U.S. 475 (1978), which requires automatic reversal when a trial court forces codefendants to accept joint representation despite objecting at the outset that the representation would create a conflict. *Id.* at 488; see also *Mickens* v. *Taylor*, 535 U.S. at 168. Such cases, like this one, also involve judges affirmatively interfering with a defendant's right to make an important threshold decision – in those cases, whether to pursue a coordinated or conflicting defense vis-à-vis his codefendants. "To determine the precise degree of prejudice sustained" when a court denies a defendant his choice to pursue a conflicting defense "is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Holloway*, 435 U.S. at 488

(quoting *Glasser* v. *United States*, 315 U.S. 60, 75-76 (1942)). A rule here, as there, requiring a defendant to prove that such a denial "prejudiced him in some specific fashion would not be susceptible of intelligent, evenhanded application." *Id.* at 490.

B. Even If Denial Of A Criminal Defendant's Sixth Amendment Right To Counsel of Choice Is Not Structural Error, The Error In This Case Still Requires Reversal.

The simple fact is that no matter how this Court assesses or characterizes the trial court's error, respondent is entitled to a new trial.

1. This Court has held that for "all" constitutional errors that are not structural, "reviewing courts must apply * * * harmless-error analysis." *Neder*, 527 U.S. at 7 (citations omitted). Accordingly, if this Court were to conclude that erroneously denying the right to counsel of choice is not structural error, the proper standard for analyzing such denials would be the harmless-error test of *Chapman* v. *California*, 386 U.S. 18 (1967).[16] Such an analysis would acknowledge

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[16] *Chapman* supplies the default standard of harmless error review for a wide variety of distinct constitutional errors, including those implicating the Sixth Amendment. See, *e.g.*, *Chambers* v. *Maroney*, 399 U.S. 42, 52-53 (1970) (applying harmless error analysis to violations of Fourth Amendment right against unreasonable searches and seizures); *Bumper* v. *North Carolina*, 391 U.S. 543, 550 (1968) (same); *Brown* v. *United States*, 411 U.S. 223, 231-32 (1973) (applying *Chapman* to violations of the Sixth Amendment right against admission of out-of-court statements of non-testifying co-defendants); *Harrington* v. *California*, 395 U.S. 250, 254 (1969) (same); *Milton* v. *Wainwright*, 407 U.S. 371, 372 (1972) (applying *Chapman* to violations of the Sixth Amendment right against interrogation without counsel after the right to counsel has attached); *Van Arsdall*, 475 U.S. at 684 (applying *Chapman* to violation of the Sixth Amendment right to cross examine witnesses for bias); *Fulminante*, 499 U.S. at 295 (applying *Chapman* to

the constitutional nature of the error but would easily address the few hypotheticals that the government conjures up to argue that an automatic reversal rule is unfair. See Petr. Br. 16-17. In unlikely scenarios such as a defendant retaining as substitute counsel a highly skilled attorney from the same high-powered firm as his first choice, the government could presumably show that "the guilty verdict actually rendered in th[e] trial was surely unattributable to the error." *Sullivan* v. *Louisiana*, 508 U.S. 275, 279 (1993).

Respondent's inability to be represented at trial by Low, however, was not harmless under the *Chapman* standard. In order for a reviewing court to find a constitutional error harmless, the government must "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." 386 U.S. at 24. The logic underlying the *Chapman* standard dates back to "the original common-law harmless-error rule" and carries no less force today than it did then: when faced with constitutional error, the "burden [is] on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment." *Ibid.*

The government cannot carry this burden here. The quality of respondent's defense counsel was critical because the government's case was circumstantial. There was no direct evidence indisputably tying respondent to the alleged conspiracy. The government never found any drugs in respondent's possession. Nor was the prosecution able to present anything respondent ever said that suggested he knowingly paid Guillen money for transporting drugs. And respondent did not take the stand at trial.

Yet the district court's actions caused respondent to proceed to trial with far less able counsel than he had chosen.

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coerced confessions); see also Harry T. Edwards, *To Err is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. Rev. 1167, 1176-78 (1995).

The trial record, which is all that ordinarily will be available on direct appeal, shows that respondent's chosen attorney was more experienced and skillful than his substitute counsel. Low has a long and successful record of criminal defense work. Only months before respondent retained him, he had obtained an excellent result in a drug conspiracy case in the same court in which respondent was tried. See Pet. App. 2a; *supra*, at 2-3. Dickhaus, by contrast, is a consumer protection attorney who specializes in "junk fax" litigation. Dickhaus had never tried a federal criminal case, and had no intention of trying this one. Yet that is what the district court effectively required; the court even prevented Low from sitting at counsel table or meeting with respondent in other ways during trial. See Pet. App. 5a; J.A. 20-22. One can hardly say, beyond a reasonable doubt, on this record that erroneously disqualifying Low from representing respondent did not affect the verdict.

Comparing Dickhaus's cross-examination of the prosecution's key witness, Jorge Guillen, during respondent's trial and Low's later cross-examination of the same witness during remand proceedings confirms the dramatic difference that respondent's chosen attorney would have had here. Guillen's testimony and credibility were critical at trial because he claimed that respondent met him at the mini-mart in order to deliver money to pay for transporting drugs. J.A. 31-33; Trial Tr. Vol. III 19:14-25, July 9, 2003. Dickhaus was unable to shake Guillen from this story. J.A. 38-40. Yet under Low's aggressive questioning in the deposition on remand, Guillen admitted that he was generally untrustworthy, App. 1a ("You know, I'm [a] liar. I'm mean I'm not going to say no."), and that he had lied regarding respondent's involvement in the conspiracy. App. 3a-4a. The truth, Guillen now said, was that he induced respondent to meet him at the mini-mart by saying he needed money to obtain medical care for his sick daughter. *Ibid.* A jury that heard this admission might well not have convicted respondent.

2. Even if the "adverse effect" standard the Seventh Circuit adopted in the habeas context in *Rodriguez* v. *Chandler*, 382 F.3d 670 (CA7 2004), or some other requirement that respondent prove prejudice were somehow applicable here, this Court would still be required to affirm the judgment below.

To obtain a new trial under the *Rodriguez* test – which, it must be recalled, the Seventh Circuit applied only in a habeas proceeding where *Chapman*'s harmless error standard is not the default test – a defendant must show "an identifiable difference in the quality of representation between the disqualified counsel and the attorney who represents the defendant at trial." 382 F.3d at 675. But "[t]he difference does not have to be great enough to undermine confidence in the outcome" of the case; it is "enough to show that the defendant's representation suffered a setback from the disqualification." *Ibid.*

That standard is clearly satisfied here. At trial, Dickhaus was unable to impeach Guillen's testimony on cross-examination. J.A. 38-40. At one point, in fact, after the government objected to Dickhaus's attempt at impeachment, the court twice admonished Dickhaus to "[r]ead" the Federal Rules of Evidence after Dickhaus admitted, "I don't quite understand the objection or the scope of the objection." *Id.* at 36-37. In contrast, Low was able to severely discredit Guillen's testimony regarding respondent's connection to the conspiracy and his general character for truthfulness. See, *e.g.*, App. 1a, 3a-4a. This difference alone is "enough to show that the defendant's representation suffered a setback from the disqualification," and that Low would have advanced "a line of defense that [Dickhaus] was unable to sustain on his own." *Rodriguez*, 382 F.3d at 675.

The same result would follow even under the government's proposed rule that the defendant show that "his counsel of choice would have pursued a different defense strategy that would have created a 'reasonable probability that

* * * the proceeding would have been different.'" Petr. Br. 15-16 (quoting *Strickland*, 466 U.S. at 694). Low would have pursued a fundamentally different trial strategy than the one Dickhaus employed. Dickhaus premised respondent's defense on the notion that the government had insufficient evidence to convict. He argued simply that "no one" could know with certainty why respondent appeared at a convenience store and gave Guillen money. J.A. 25. Because of the fortuity of this case's remand proceedings, however, we know now that Low would have endeavored to prove respondent's actual innocence. He would have been able to force Guillen to admit on cross-examination that respondent delivered the money to him in response to his fabricated plea to help a sick relative. See App. 2a-4a. There can be little doubt, therefore, that Dickhaus's defense was "substantially less likely to achieve acquittal." Petr. Br. 16 (quotation omitted).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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Excerpts from the Deposition of Jorge Guillen Taken on Behalf of the Plaintiff in *United States* v. *Cuauhtemoc Gonzalez-Lopez*, Cause No. 4:03CR00055JCH (E.D. Mo., May 25 and 26, 2005).

* * * * *

[p. 102, line 13]

MR. LOW: What's my question?

MR. GUILLEN: If I'm lying more to the United States government or the police department. You know, I'm liar. I mean I'm not going to say no.

MR. LOW: You are a liar, aren't you?

MR. GUILLEN: I told you, in the past I would lie.

* * * * *

[p. 301, line 20]

MR. LOW: But then you tell him you need—you know, you tell him the reason why you haven't done it yet is because your daughter's sick and in the hospital, right?

MR. GUILLEN: Yes, sir.

MR. LOW: And that's why you need the money, for your daughter, right?

MR. GUILLEN: Yes, sir.

MR. LOW: So you can pay her hospital bills, right?

MR. GUILLEN: Yes, sir.

MR. LOW: No doubt about it, right?

MR. GUILLEN: Yes.

MR. LOW: So the real reason that Tomas came out and met you was to give you money so her—because he could help your daughter out with her medical bills; isn't that true?

MR. GUILLEN: I was tell him that I need money for that and to pay the guys for the drugs.

MR. LOW: Oh. So you also needed money to pay for the guys; is that true?

MR. GUILLEN: Yeah, that's true.

MR. LOW: Oh, okay. I don't understand something. You just told him you haven't finished the job, right?

MR. GUILLEN: Yes.

MR. LOW: But every single time before, you never got paid before you finished the job; isn't that true?

MR. GUILLEN: I was tell Tomas that Dewayne, he don't want me to take the drugs out of the house.

MR. LOW: What's my question?

MR. GUILLEN: Yeah, they never pay me before I finish it.

MR. LOW: So now you're going to call up the big boss for the first time late in the evening, or actually very early in the morning, and tell the big boss, guess what, I ain't finished the job yet, but you need to pay me anyway. Is that what you want us to believe?

MR. GUILLEN: That's what he believed.

MR. LOW: Answer the question. Is that what you want us to believe?

MR. GUILLEN: No, but, you know, I was tell him that.

MR. LOW: The truth of the matter is you simply got him to believe that you needed money to help your daughter out; isn't that right?

MR. GUILLEN: But I was tell him too the same time that I need to pay that guy, to Dewayne, because he had the job and he needs some money.

MR. LOW: Sure. And you got him to believe that you needed money so you could pay for your daughter in the hospital; isn't that right?

MR. GUILLEN: Yeah, yeah.

MR. LOW: And you knew that would work because you knew Tomas was Hispanic and your friend, right?

MR. GUILLEN: Yes, sir.

MR. LOW: And you knew that if you told him about your family and how important they were to you and that you needed help, that he'd come out and give you some money for that; isn't that right?

MS. BECKER: Objection to the form.

MR. LOW: That's true isn't it?

MR. GUILLEN: Yes, sir.

MR. LOW: And so he agreed to meet you and give you some money; is that right?

MR. GUILLEN: Yeah.

MR. LOW: And you went out to meet him, right?

MR. GUILLEN: Yes.

* * * * *

[p. 348, line 1]

MR. LOW: Isn't it true that you just came up with that story about making a trip to Maryland Heights to Tomas's house to deliver drugs? You just made that up in February of '03; isn't that true?

MR. GUILLEN: Yeah, that's true.

MR. LOW: It's true, isn't it?

MR. GUILLEN: Yeah.

MR. LOW: And then—you know what? That's all I have. Nothing further.

* * * * *

[p. 350, line 1]

MR. LOW: I'll ask one more time, anticipating a future objection on the last question. Isn't it true you've lied to us on several occasions today about your testimony?

MS. BECKER: Objection to the form of the question, assumes facts not in evidence, argumentative.

MR. GUILLEN: I was telling you it was not my intention.

MR. LOW: What's my question?

MS. BECKER: Objection, asked and answered.

MR. GUILLEN: If I was liar.

MR. LOW: And it's true that you've lied to us several times today, isn't it?

MS. BECKER: Objection, asked and answered.

MR. GUILLEN: Yes, sir.

MR. LOW: Nothing further.

No. 05-352

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

CUAUHTEMOC GONZALEZ-LOPEZ

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF CONTENTS

Page

A. The denial of the right to counsel of choice violates the Sixth Amendment only when the denial adversely affects the defendant's right to a fair trial 1

B. Practical considerations do not warrant a rule of automatic reversal 9

C. The denial of counsel of choice is not a structural error 12

D. The proper disposition of this case is a remand to permit respondent to make a showing of prejudice 17

TABLE OF AUTHORITIES

Cases:

Brady v. *Maryland*, 373 U.S. 83 (1963) 13

Caplin & Drysdale, Chartered v. *United States*, 491 U.S. 617 (1989) 3

Chandler v. *Fretag*, 348 U.S. 3 (1954) 6

Chapman v. *California*, 386 U.S. 18 (1967) 17

Delk v. *State*, 26 S.E. 752 (Ga. 1896) 3

Faretta v. *California*, 422 U.S. 806 (1975) 4, 14

Holloway v. *Arkansas*, 435 U.S. 475 (1978) 6

Kyles v. *Whitley*, 514 U.S. 419 (1995) 13

McKaskle v. *Wiggins*, 465 U.S. 168 (1984) 4

Martinez v. *Court of Appeal*, 528 U.S. 152 (2000) 4

Mickens v. *Taylor*, 535 U.S. 162 (2002) 2, 5, 6

Neder v. *United States*, 527 U.S. 1 (1999) 17

Cases—Continued: Page

People v. *Gordon*, 30 N.Y.S. 2d 625 (App. Div. 1941) 3
Powell v. *Alabama*, 287 U.S. 45 (1932) 6
Rodriguez v. *Chandler*, 382 F.3d 670 (7th Cir.), cert. denied, 543 U.S. 1156 (2005) 17
Smith v. *United States*, 348 F.3d 545 (3d Cir. 2003) 11
Strickland v. *Washington*, 466 U.S. 668 (1984) 2, 5, 6, 12, 18
Strickler v. *Greene*, 527 U.S. 263 (1999) 9
United States v. *Armstrong*, 517 U.S. 456 (1996) 9
United States v. *Ash*, 413 U.S. 300 (1973) 2
United States v. *Bergamo*, 154 F.2d 31 (3d Cir. 1946) 3
United States v. *Carmichael*, 216 F.3d 224 (2d Cir. 2000) 11
United States v. *Cronic*, 466 U.S. 648 (1984) 2, 4, 5, 6
United States v. *Gouveia*, 467 U.S. 180 (1984) 2
United States v. *Mechanik*, 475 U.S. 66 (1986) 11
United States v. *Morrison*, 449 U.S. 361 (1981) 5, 9
United States v. *Santos*, 201 F.3d 953 (7th Cir. 2000) 8
Wheat v. *United States*, 486 U.S. 153 (1988) 2, 3, 4, 8, 9
Wood v. *Commonwealth*, 30 Va. (3 Leigh) 743 (1827) 3

Constitution:

U.S. Const. Amend. VI ..... *passim*
Assistance of Counsel Clause 2, 3, 13, 14

Miscellaneous:

Page

James Alexander, *A Brief Narrative of the Case and Trial of John Peter Zenger* (1972) 7

2 Thomas Babington Macauley, *History of England from the Accession of James II* (1856) 7

REPLY BRIEF FOR THE UNITED STATES

The court of appeals held that the denial of a defendant's first-choice counsel requires automatic reversal of a conviction even if the denial had absolutely no impact on the fairness of the proceeding. Respondent does not refute the government's submission that the denial of a defendant's first-choice counsel does not *inherently* prejudice the outcome of a criminal trial. Respondent nonetheless argues that an improper denial of counsel of choice warrants automatic reversal, because such a result, in his view, accords with the Sixth Amendment's history and purpose, as well as sound policy considerations. None of those contentions has merit.

A. The Denial Of The Right To Counsel Of Choice Violates The Sixth Amendment Only When The Denial Adversely Affects The Defendant's Right To A Fair Trial

1. Respondent contends (Br. 9, 12-13, 22-24) that a rule of automatic reversal is justified whenever first-choice counsel is improperly denied because the right to counsel of choice forms the "core" of the Sixth Amendment that protects a defendant's autonomy and the public perception of fairness, independent of the actual fairness of a criminal proceeding. In a similar vein, respondent argues (Br. 29) that because the right to counsel of choice is the "core concept" protected by the Sixth Amendment, whereas the right to the effective assistance of counsel is simply an "implied" right that "emanat[es] from an overall purpose of the Sixth Amendment," the Constitution mandates automatic reversal upon the denial of the right to counsel of choice.

Those contentions cannot be reconciled with the text of the Sixth Amendment, its purpose, or this Court's cases. The Sixth Amendment contains no "Choice of Counsel" Clause

that furthers free-standing autonomy and dignity interests. The Sixth Amendment guarantees an accused "the Assistance of Counsel *for his defence*," U.S. Const. Amend. VI (emphasis added), and the Assistance of Counsel Clause is part of an Amendment that "defines the basic elements of a fair trial." *Strickland* v. *Washington*, 466 U.S. 668, 685 (1984).

This Court's decisions accordingly have repeatedly recognized, based on an extensive review of the "historical background" of the Sixth Amendment, that the "*core*" purpose of the right to counsel is to guarantee that the defendant has the assistance of counsel to ensure a fair adversarial process that separates the innocent from the guilty. *United States* v. *Ash*, 413 U.S. 300, 309 (1973) (emphasis added); see *United States* v. *Gouveia*, 467 U.S. 180, 188-189 (1984) ("We have recognized that the core purpose of the counsel guarantee" is to "protect[] the unaided layman at critical confrontations with his adversary.") (internal quotation marks omitted); *Mickens* v. *Taylor*, 535 U.S. 162, 166 (2002) ("This right has been accorded, we have said, 'not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial.'") (quoting *United States* v. *Cronic*, 466 U.S. 648, 658 (1984)); *Wheat* v. *United States*, 486 U.S. 153, 158-159 (1988) (observing that the Sixth Amendment right "was designed to assure fairness in the adversary criminal process" and that "the purpose of providing assistance of counsel 'is simply to ensure that criminal defendants receive a fair trial'") (quoting *Strickland*, 466 U.S. at 689).

Respondent invites the Court to ignore those precedents, and establish a new and additional "core" to the Sixth Amendment that is rooted in individual autonomy and free will, by stitching together historical anecdotes about governmental interference with the choice of counsel in the trials of the Seven Bishops and John Peter Zenger, Br. 13-15, early legislative actions by the States and Congress to ensure the assis-

tance of counsel, Br. 16-17, 19-21, and judicial decisions recognizing a defendant's right to select his own counsel, Br. 17-19. Those anecdotes and authorities establish, at most, the undisputed proposition that "the right to select and be represented by one's preferred attorney is *comprehended* by the Sixth Amendment." *Wheat*, 486 U.S. at 159 (emphasis added). They do not prove that the Assistance of Counsel Clause was adopted to further interests other than the fairness of the trial process. And none of respondent's authorities addresses the precise issue before the Court here: whether a criminal conviction should be automatically reversed without any showing of prejudice.

To the extent that any of respondent's historical authorities even involved the reversal of a criminal conviction, they are inapposite. One of the decisions cited by respondent (Br. 17-18), *Delk* v. *State*, 26 S.E. 752 (Ga. 1896), was decided more than a century after the ratification of the Constitution. The court also relied on the *State's* constitution (*id.* at 753) and did not address the issue whether prejudice is a prerequisite to reversal of a criminal conviction. Respondent also cites (Br. 16) *Word* v. *Commonwealth*, 30 Va. (3 Leigh) 743 (1827), but that decision involved the *complete* denial of counsel because a minor was appointed a guardian to enter a plea and the court refused to permit any argument by counsel.[1]

2. Respondent also places substantial reliance (Br. 22-23) on the dissenting opinions in *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617, 645-646 (1989) (Blackmun, J.,

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[1] Respondent also relies (Br. 18-19) on two other decisions involving reversal of a criminal conviction, *United States* v. *Bergamo*, 154 F.2d 31 (3d Cir. 1946), and *People* v. *Gordon*, 30 N.Y.S.2d 625 (App. Div. 1941) (per curiam), but they too do not discuss the issue presented here. Moreover, the intermediate state court in *Gordon* relied on the state constitution, *id.* at 626, and the court in *Bergamo* found that substitute counsel provided ineffective assistance. 154 F.2d at 35.

dissenting), and *Wheat*, 486 U.S. at 165-166 (Marshall, J., dissenting), and the decisions of this Court construing the right to self-representation as furthering the values of individual dignity and autonomy over concerns about providing an effective defense for the accused. Br. 23 (citing *Martinez* v. *Court of Appeal*, 528 U.S. 152, 165 (2000) (Scalia, J., concurring), *McKaskle* v. *Wiggins*, 465 U.S. 168, 176-177 (1984), and *Faretta* v. *California*, 422 U.S. 806, 819-820 (1975)). Respondent fails to acknowledge, however, that the *majority* in *Wheat* held that the interests served by the right to counsel of choice are cognizable under the Sixth Amendment *only insofar* as they guarantee the defendant a fair trial. This Court held in *Wheat* that "while the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, *the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant*." 486 U.S. at 159 (emphasis added). Accordingly, the Court in *Wheat* concluded that "in evaluating Sixth Amendment claims, *'the appropriate inquiry focuses on the adversarial process, not on the accused's relationship with his lawyer as such.'*" *Ibid.* (quoting *Cronic*, 466 U.S. at 657 n.21) (emphasis added).

Wheat also established that the right to counsel of choice is "circumscribed in several important respects." 486 U.S. at 159. Respondent acknowledges that the right "is not absolute" (Br. 25) and may be subordinate to countervailing interests within the trial court's discretion. U.S. Br. 12-13. The qualified and limited nature of the right to counsel of choice stands in stark contrast to the unqualified and absolute right of a defendant to the effective assistance of counsel, whose denial requires a showing of prejudice. If a defendant whose counsel was professionally incompetent must show prejudice before obtaining relief, so too should a defendant denied his preferred attorney. *Id.* at 13-15.

3. Respondent also fails to acknowledge the mode of analysis established by this Court's precedents, which heretofore have subjected *all* claims of Sixth Amendment denials of the right to counsel to a requirement of prejudice unless "the likelihood that the verdict is unreliable is so high that a case-by-case inquiry is unnecessary." *Mickens*, 535 U.S. at 166; accord *Strickland*, 466 U.S. at 692 (distinguishing ineffective assistance of counsel from "certain Sixth Amendment contexts, [where] prejudice is presumed"); *Cronic*, 466 U.S. at 658 ("Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated" unless the denial of counsel involves "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified."); *United States* v. *Morrison*, 449 U.S. 361, 365 (1981) ("The premise of our prior cases is that the constitutional infringement identified has had or threatens some adverse effect upon the effectiveness of counsel's representation or has produced some other prejudice to the defense.").[2]

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[2] Respondent argues that the Court in *Strickland* found that "a prejudice rule was necessary" because "the availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges," Br. 36 (quoting *Strickland*, 466 U.S. at 690), and "that a defendant-friendly test for ineffective assistance would deter lawyers from representing criminal defendants," Br. 37. The portion of *Strickland* relied upon by respondent had nothing to do with the Court's imposition of a *prejudice* requirement. Rather, the Court relied upon the policy concerns noted by respondent to explain why review of attorney "*performance* must be highly deferential." 466 U.S. at 689-690 (emphasis added). As indicated in the text, the Court in *Strickland* held that a prejudice requirement was warranted because "[t]he purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding." *Id.* at 691-692.

The three decisions relied upon by respondent (Br. 19, 43-44)) involving the right to counsel, *Powell* v. *Alabama*, 287 U.S. 45 (1932), *Chandler* v. *Fretag*, 348 U.S. 3 (1954), and *Holloway* v. *Arkansas*, 435 U.S. 475 (1978), are fully consistent with the above framework. *Cronic*, 466 U.S. at 659-661, made clear that a presumption of prejudice in *Powell* was warranted when the trial court appointed counsel to represent multiple defendants on the day of their capital trial. The Court in *Cronic* explained that "*Powell* was thus a case in which the surrounding circumstances made it so unlikely that any lawyer could provide effective assistance that ineffectiveness was properly presumed without inquiry into actual performance at trial." *Id.* at 661.

Similarly, in *Chandler*, 348 U.S. at 5-6, the defendant was completely denied counsel during trial. "Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice." *Strickland*, 466 U.S. at 692. Finally, this Court explained in *Mickens*, 535 U.S. at 166-168 & n.1, that no showing of prejudice is required in the circumstances presented by *Holloway*, *i.e.*, when counsel, over his objection, is forced to represent multiple defendants with conflicting interests, because a trial with counsel who labors under those conditions is inherently unreliable.

Respondent does not argue that the denial of a defendant's first-choice counsel is *inherently* prejudicial to a defendant's ability to receive a fair trial such that a presumption of prejudice is warranted. U.S. Br. 17-20. Nor does respondent dispute that the rule that he urges would require automatic reversal even where a defendant who is denied his first choice retains equally qualified substitute counsel. *Id.* at 16-17. Respondent relies on the absence of any *documented* "windfall" from an automatic reversal rule. Resp. Br. 11, 36, 38. But reversal of a criminal conviction is never justified, and thus a "windfall" necessarily results, whenever society suffers

the costs and burdens of a retrial even though the denial of counsel of choice made no difference in the outcome.

Respondent's historical examples well illustrate the oddities of a rule of automatic reversal. As respondent explains (Br. 15), when John Peter Zenger was barred from retaining his two preferred counsel, he retained Andrew Hamilton of Philadelphia, who was "[r]eputedly the best lawyer in America" and had "years of courtroom experience." J. Alexander, *A Brief Narrative of the Case and Trial of John Peter Zenger* 22, 23 (1972). Hamilton successfully defended Zenger "[b]y sheer eloquence, and by following [initial counsel's] original strategy." Resp. Br. 15. Respondent also explains that when the Seven Bishops were tried in 1688, they retained Sir Creswell Levinz along with "an army of other eminent" and "impressive" lawyers." Br. 14; see 2 T.B. Macauley, *History of England from the Accession of James II*, at 345 (1856) (in addition to Livinz, the Bishops retained "almost all the eminent forensic talents of the age," including counsel who were "reputed the two best lawyers that could be found in all the inns of court"). Respondent's rule would require automatic reversal even if a modern-day Andrew Hamilton obtained an acquittal on every count but one in a case involving multiple charges. And automatic reversal would apparently be required even were a defendant denied just one lawyer but otherwise defended by a "dream team" of counsel hand-picked by the defendant. Indeed, respondent's rule presumably would mandate an automatic reversal even had the trial court in this case improperly barred *Dickhaus* from the courtroom instead of *Low*. Cf. Resp. Br. 14 (describing "deliberate care" with which the Bishops chose "the junior counsel").

Respondent's examples are also noteworthy because they reflect the common sense proposition that a defendant denied his first-choice counsel can be presumed to find other counsel (or even a team of other counsel) who will mount a robust

defense and will give the defendant effective control over his defense. The examples also reveal the fallacy in respondent's suggestion (Br. 22-23) that disqualification of a defendant's chosen attorney would necessarily cause a defendant to lose his "individual dignity, autonomy, and free will" or "to be suspicious of any lawyer whom the government allowed to stay in a case." Clients still retain autonomy to select other lawyers. At most, the interests will be seriously implicated in only a subset of cases, yet respondent's rule would require automatic reversal even if none of the interests identified by respondent were infringed in a particular case.

4. A showing of prejudice as a prerequisite to reversal of a criminal conviction does not, as respondent suggests (Br. 25-30-31), mean that trial courts may arbitrarily deny counsel of choice or do so as long as the court concludes that representation by substitute counsel will not prejudice the defense. District courts "must recognize a presumption in favor of petitioner's counsel of choice." *Wheat*, 486 U.S. at 164. Respondent has no basis for suggesting (Br. 31) that courts would undertake (or prosecutors would seek) to disqualify an attorney "on the grounds that the defendant's counsel 'parts his hair on the right.'" Mandamus relief would also be available where the denial of counsel of choice constitutes a clear abuse of discretion. *E.g.*, *United States* v. *Santos*, 201 F.3d 953, 960-961 (7th Cir. 2000); cf. Pet. App. 3a (noting that defendant sought mandamus relief, which appellate court denied).

Acknowledgment that the right to counsel of choice is "comprehended" within the Sixth Amendment and must be respected by trial courts, *Wheat*, 486 U.S. at 159, does not mean that a defendant who suffers an infringement of that constitutionally protected interest is entitled to automatic reversal of his conviction absent any showing of an adverse impact on the outcome. Rather, rejection of an automatic reversal rule is consistent with this Court's approach of "tai-

loring relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial." *Morrison*, 449 U.S. at 365; cf. *Strickler* v. *Greene*, 527 U.S. 263, 281 (1999) (footnote omitted) (although "the term '*Brady* violation' is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence[,] * * * strictly speaking, there is never a real '*Brady* violation' unless the non-disclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict."). As is the case with the right to the effective assistance of counsel, requiring a showing of prejudice before there is a completed violation properly balances the Sixth Amendment interest at stake against the societal interest in preserving a conviction that results from a fundamentally fair trial. *Morrison*, 449 U.S. at 364.

B. Practical Considerations Do Not Warrant A Rule Of Automatic Reversal

1. Respondent argues (Br. 10, 31) that a prejudice requirement would give incentives for "overzealous prosecutors" to seek the removal of "particularly effective defense counsel" and would "push[] judges to grant motion to disqualify counsel of choice." That contention conflicts with the strong presumption that public officials will faithfully discharge their public duties. *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996); U.S. Br. 30. It also conflicts with this Court's rejection of a similar claim in *Wheat*, 486 U.S. at 163 (finding no basis to believe that trial courts would be unduly influenced by arguably manufactured claims of conflict of interest by the government). And it ignores the reality that the relevant substantive law protects the interest in retaining counsel of choice by limiting the circumstances in which a plausible claim for disqualification will exist. Moreover, to the extent this

Court's decision would have any effect on the filing or granting of disqualification motions, a rule of automatic reversal would have the likely effect of chilling both prosecutors and courts from focusing on whether counsel labors under a conflict or is otherwise unqualified to serve as defense counsel. An erroneous disqualification would invalidate a conviction and require a retrial even where first-choice counsel would have made no difference in the outcome. Prosecutors and courts would thus pay a steep and unjustified price for any error in judgment regarding the initial disqualification.

2. Respondent also argues (Br. 33) that a prejudice requirement would give a defendant who is convinced that he was improperly denied his counsel of choice the perverse incentive "to hire an utterly incompetent substitute attorney for the instant trial" in order to obtain a new trial on appeal. But the government's fundamental submission is *not* that a defendant must show that counsel was *incompetent* to obtain reversal. Rather, a defendant must show that representation by first-choice counsel would have created a reasonable probability of a difference in the outcome of the proceeding. U.S. Br. 15-17, 21-24, 30-31. In any event, as respondent ultimately concedes (and as Zenger's retention of Hamilton illustrates), "virtually all defendants will * * * try to obtain the best possible substitute counsel and urge that counsel to follow the same basic strategy as his original counsel would have planned." Resp. Br. 33. The fact that prejudice accordingly may be difficult to show in such circumstances does not mean that the requirement is unjustified; that fact demonstrates the general absence of prejudice from the denial of counsel of choice, as well as the lack of justification for fashioning an automatic reversal rule that is based on a presumption of prejudice. U.S. Br. 23-24.

Respondent also contends (Br. 33-34) that defendants who seek to retain a particular attorney with the intent of pleading

guilty would be precluded from receiving any remedy if counsel of choice were improperly denied, even if that attorney could have negotiated a better plea agreement. It is not at all clear that disqualification disputes precede guilty pleas with any frequency, but in any event, respondent's concern is misplaced. Defendants who go to trial regularly claim that, but for the ineffective assistance of counsel, they would have negotiated an advantageous plea agreement, pleaded guilty, and received a more favorable sentence. See, *e.g.*, *Smith* v. *United States*, 348 F.3d 545, 551-553 (3d Cir. 2003). A defendant who has pleaded guilty also may challenge his sentence on the ground that competent counsel would have urged him to accept an earlier and better plea offer. *United States* v. *Carmichael*, 216 F.3d 224, 226-227 (2d Cir. 2000). Thus, a defendant who pleaded guilty, but who claims that counsel of first choice would have been able to obtain a more favorable plea or sentence, could similarly seek to show that first-choice counsel would have deployed a different strategy that had a reasonable probability of producing a better outcome, either through plea negotiations or through contesting the government's sentencing claims.

3. Respondent also argues (Br. 34-35) that the costs of retrials from an automatic reversal rule would be outweighed by the burdens of evidentiary hearings in collateral proceedings through which a defendant may show prejudice. But that contention completely discounts the harms and costs imposed on victims and society by the automatic reversal of a criminal conviction procured in a fundamentally fair trial. *United States* v. *Mechanik*, 475 U.S. 66, 72 (1986). And, moreover, evidentiary hearings (and their attendant costs) are not a foregone conclusion in every case. In any event, evidentiary hearings are regularly conducted under *Strickland*, and any burdens associated with those hearings do not justify dispensing with the requirement that the defendant must show preju-

dice. For similar reasons, respondent errs in relying (Br. 34, 36) on the supposed "years" in prison that defendants might endure while their Sixth Amendment claims are being litigated in collateral proceedings. Given the absence of any reason to presume that a claimed improper denial of counsel of choice prejudiced the defense, there is no basis for distinguishing those claims from those alleging ineffective assistance of counsel.[3]

Respondent also errs in asserting (Br. 30, 35-36) that determining prejudice from a denial of counsel of choice would be complicated or impossible. That argument conflates the unlikeliness that prejudice will actually occur with the difficulty of ascertaining it in the rare case in which it does occur. When the first-choice counsel developed a trial strategy before disqualification, a trial court can more readily determine the actual trial strategy of first-choice counsel than, under *Strickland*, some unknown and entirely hypothetical trial strategy of a competent attorney. In other cases, the assessment involved in determining prejudice from the denial of counsel of choice is not meaningfully different from the prejudice inquiry performed under *Strickland*. U.S. Br. 22-23.

C. The Denial Of Counsel Of Choice Is Not A Structural Error

Respondent argues (Br. 39) that the denial of counsel of choice constitutes a structural error that requires automatic

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[3] For similar reasons, respondent mistakenly argues (Br. 36 n.10) that a prejudice requirement would require the defendant to reveal to the prosecution the defendant's strategy for a retrial. The same "perverse" (*ibid.*) consequences flow from collateral proceedings resolving *Strickland* claims. Defendants routinely reveal their strategies in arguing that counsel should have undertaken an alternative investigation or strategy and that such action would have produced an acquittal. *E.g.*, *Strickland*, 466 U.S. at 699-700 (discussing "evidence that respondent says his trial counsel should have offered").

reversal because the right to counsel of choice "implicates values of personal autonomy that reach beyond ensuring 'proper' trial outcomes" and because "the choice of counsel pervades the entre proceeding." Respondent therefore argues (Br. 38) that the government should not be permitted to show that the denial of counsel of choice constituted harmless error. The government's position, however, is not that it should be required to show that such denial constitutes harmless error, but rather that, absent the defendant's showing that a denial of counsel of choice is prejudicial, the Sixth Amendment is not violated.[4] Moreover, for the same reasons that the Sixth Amendment is not violated absent prejudice, a denial of the right to counsel of choice does not constitute structural error.

1. As discussed, pp. 2-3, *supra*, this Court has repeatedly held that the purpose of the Sixth Amendment Assistance of Counsel Clause is not to promote individual autonomy in the abstract, but to ensure that a defendant receives a trial that can be fairly said to distinguish between guilt and innocence. Because there is no basis for presuming a fundamentally unfair trial from the denial of counsel of choice, the denial is not a structural defect that requires automatic reversal. Similarly, the limited and qualified nature of the right to counsel of choice is at odds with the notion that the denial of the right is so fundamental to our system of justice that the denial should be deemed a structural defect. U.S. Br. 25-26.

Respondent thus is mistaken in asserting (Br. 39) that the right to counsel of choice serves not the "pursuit of the 'cor-

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[4] Conversely, a defendant's showing of prejudice renders the constitutional violation complete, and the government accordingly cannot show that the violation was harmless error. Cf. *Kyles* v. *Whitley*, 514 U.S. 419, 435 (1995) (Once a reviewing court has found materiality to show error under *Brady* v. *Maryland*, 373 U.S. 83 (1963), "there is no need for further harmless-error review.").

rect' verdict," but autonomy and dignity interests similar to the right of self-representation. The right to self-representation does not derive from the Sixth Amendment's right to the "Assistance of Counsel" but from other sources in the Constitution. U.S. Br. 29. The right to self-representation also protects an individual's autonomy and dignity even when self-representation would be detrimental to his defense. By contrast, the right to counsel of choice exists solely by virtue of the Assistance of Counsel Clause, and the right may be subordinated to concerns about the fairness of the proceeding. U.S. Br. 28-29. An individual who desires self-representation but is nonetheless forced to proceed to trial with counsel appointed by the court (see, *e.g.*, *Faretta*, *supra*) suffers an affront to his autonomy and dignity substantially different both in kind and in degree from a defendant, such as respondent, who makes the decision to be represented by counsel and in fact is represented by counsel whom he chooses (albeit not as his first choice). U.S. Br. 29-30.

Respondent's historical anecdotes again prove the point. The trial of Zenger cannot be said to have been structurally defective because Zenger, who was not given his first-choice counsel, was nonetheless able to retain the reputed best lawyer in the country, who acted consistent with the defense strategy of his client and his first-choice counsel. And a defendant represented by an "army" (Resp. Br. 14) of lawyers may well be able to expresses an abundance of free will in his selection of counsel, even if he is improperly denied one member of the team.

Respondent argues (Br. 40) that he "should have been allowed to choose" which defense style he preferred—Low's aggressive style or Dickhaus' "tentative and conciliatory" style. But respondent's automatic reversal rule would ascribe structural error to every case, even if second-choice counsel executed the defendant's chosen strategy with greater skill

than the first-choice counsel would have done. This case also is not one in which a defendant was given no choice in the selection of counsel or had counsel foisted upon him, as respondent repeatedly suggests. Br. 4-5, 28, 40-41, 45-46. Respondent does not dispute that he voluntarily retained Dickhaus on the recommendation of Low, his first-choice counsel whose judgment respondent claims he trusts. Nor does respondent dispute that he informed the trial court that he wanted Dickhaus to represent him after Low's participation was ruled out. Pet. App. 3a-4a; U.S. Br. 19 n.4. Respondent also does not argue that he took any steps to hire counsel other than Dickhaus during the four-month period following the magistrate judge's initial decision that Low would not be permitted to represent him. *Ibid.*[7] Respondent asserts (Br. 28) that his "lack of additional resources" prevented him from hiring another counsel to assist or replace Dickhaus. Yet respondent was apparently financially able to retain not only Dickhaus, but also two out-of-state counsel, Fahle, from Texas, and Low, from California, to represent him in the initial proceedings, Pet. App. 2a-4a, and respondent has continued to employ both Low and Dickhaus in connection with the reversal and new trial ordered by the court of appeals. Resp. Br. 8.

2. Respondent also argues (Br. 41) that because a defendant's choice of counsel has an effect that "pervade[s] the entire criminal proceeding," it is impossible to isolate or assess the effect of an erroneous denial of counsel of choice on the fairness of the proceeding. That contention, however, can

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[7] Respondent states (Br. 5) that because Dickhaus "became increasingly concerned that Low's status would not be resolved before the trial," counsel filed a motion for a continuance in the trial date, which was denied. But counsel did not move for a continuance until July 2, 2003, just three days before the trial began on July 5, 2003. Dist. Ct. Docket Entry Nos. 257, 259.

equally be said of the right to the effective assistance of counsel. A defendant nonetheless under *Strickland* and *Mickens* must show prejudice despite the fact that counsel's deficient performance or representation of conflicting interests may permeate the entire trial. U.S. Br. 26-27.

Respondent's amicus, the National Association of Criminal Defense Lawyers, argues that lawyers are not fungible (Br. 4-7) and that a defendant's trust and confidence in his counsel enables the attorney to provide effective representation (Br. 8-15). Respondent relatedly contends that when a defendant chooses a lawyer, counsel becomes the defendant's "alter ego" whose role at trial is similar to the "director" of a "Shakespearean tragedy." Br. 41-42 (internal quotation marks omitted). Those observations, however, are not uniquely applicable to those few defendants who can afford to select their own counsel. Respondent's position would create the anomaly that defendants with appointed counsel must show prejudice to obtain a reversal (even if their "Shakespearean director" performs deficiently), while defendants with means to select their counsel receive an automatic reversal of their conviction.

There is also no basis for presuming that second-choice counsel will have a breakdown in his relationship with his client or that he cannot "direct[]" the trial according to the defendant's essential desires. Indeed, even apart from any action by a court, a defendant's first-choice counsel may simply decline the representation for any number of reasons (*e.g.*, counsel is too busy or is unwilling to take on the representation). The defendant in those instances is presumably able to retain other counsel to his liking or who can adequately serve as the defendant's "alter ego." The same is true of a defendant who is denied counsel of choice by a court.

D. The Proper Disposition Of This Case Is A Remand To Permit Respondent To Make A Showing Of Prejudice

1. Respondent argues (Br. 11, 44-45) that even if the denial of counsel of choice is not a structural defect, the government has not made a showing that the error was harmless under *Chapman* v. *California*, 386 U.S. 18 (1967). As discussed above, the denial of counsel of choice, like the ineffective assistance of counsel, does not violate the Sixth Amendment and warrant reversal of a conviction unless the defendant shows prejudice. Thus, this Court should reverse the judgment below and remand the case to the court of appeals to give respondent the opportunity to demonstrate prejudice from the disqualification of Low.[4]

In any event, even if the Court were to conclude that the denial of counsel of choice is a non-structural error that is subject to a showing of harmless error by the government, whether the government has met its burden in this case is not properly before this Court. Because the court of appeals concluded that the denial of respondent's counsel of choice required automatic reversal, the court of appeals did not address the impact of the error on the outcome of the trial. This is not the rare case in which the Court should address the issue in the first instance. See, *e.g.*, *Neder* v. *United States*, 527 U.S. 1, 25 (1999).

The same considerations apply to respondent's contentions that the judgment below should be affirmed on the alternative ground that respondent can demonstrate prejudice, either based on an "identifiable difference in the quality of representation" between Low and Dickhaus, Br. 47 (quoting *Rodriguez* v. *Chandler*, 382 F.3d 670, 675 (7th Cir. 2004), cert. denied,

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[4] Alternatively, if respondent wishes to develop the factual record further, he would have the opportunity to raise his Sixth Amendment claim on collateral review. See U.S. Br. 23 n.6.

543 U.S. 1156 (2005)), or because Low's defense strategy "would have created a 'reasonable probability that * * * the proceeding would have been different,'" Br. 47-48 (quoting *Strickland*, 466 U.S. at 694). Respondent does not dispute that an inquiry into whether a defendant was prejudiced is properly performed in collateral proceedings so that a record can be developed before the trial court. U.S. Br. 23 n.6; see Resp. Br. 34 ("requiring defendants to show prejudice will necessitate post-conviction evidentiary hearings"). Accordingly, the trial court, not this Court in the first instance, should conduct whatever evidentiary hearings may be warranted and then determine, based on the standard of prejudice adopted by this Court, whether respondent has met his burden. For instance, no court has made any findings of fact concerning respondent's assertions about the differences in trial strategies between Low and Dickhaus. Resp. Br. 40, 46-48.

2. Respondent has not shown that Dickhaus's representation had any affect on the outcome of the trial. Contrary to respondent's suggestion (Br. 45), the government had extensive evidence of his guilt. Around 2 a.m. at a convenience store parking lot, respondent delivered approximately $10,000 to Jorge Guillen hidden in a taped oatmeal box to pay drug couriers. 3 Tr. 42-46. Officers recovered from respondent's residence more than $100,000 secreted behind a kitchen baseboard, rubber-banded cash, vacuum-sealed plastic baggies strewn about the floor, rolls of larger bags, black duct tape, and gloves. *Id.* at 56-58, 63-66. A government agent also testified that he monitored a conversation between respondent and Guillen that evidenced respondent's involvement in the drug conspiracy. *Id.* at 34-36. Moreover, during a traffic stop, respondent lied to an officer by stating that he lived in Mexico, did not know anyone in the area, and had no residence in the area. *Id.* at 49. When advised of the officer's

possession of the oatmeal box and the monitored conversation, respondent hung his head and replied "This is bad." *Id.* at 50. In addition to Jorge Guillen, the government also introduced the testimony of two witnesses who directly implicated respondent in the conspiracy, 1 Tr. 73-89 (Josue Guillen), 2 Tr. 56-71 (Margarito Beltran), as well as a witness who testified about respondent's prior dealings in cocaine, marijuana, and methamphetamine, 3 Tr. 220-223 (Michael Marcus).

Respondent contends (Br. 46-48) that Low's post-trial cross-examination of one of the witnesses, Jorge Guillen, demonstrates that Low's "aggressive questioning" style would have undermined the testimony of Guillen, who testified at trial that respondent delivered cash to Guillen to pay drug couriers. According to respondent (Br. 46), Low's questioning revealed that Guillen was a "liar" and that Guillen asked respondent to deliver the cash to assist Guillen's sick daughter. Guillen's deposition testimony, however, reaffirms that respondent was delivering the cash in order to pay for drugs, and at no time during the deposition did Guillen recant his testimony as to respondent's involvement in the conspiracy. Resp. Br. App. 2a. Moreover, Low's cross-examination of Guillen is not a realistic portrayal of how Low would have cross-examined the witness at trial. Low's cross-examination took place not in a courtroom before a judge and jury, but during an unsupervised deposition in which Low, after having the benefit of Guillen's earlier trial testimony, was given an unfettered opportunity over many hours to question the witness.

More importantly, Low's theory that respondent gave Guillen nearly $10,000 hidden in a taped oatmeal box to help Guillen's sick daughter would have been scarcely plausible. Respondent does not address how Low would have explained to the jury why the money was delivered in cash, secreted in a oatmeal box, or delivered in the middle of the night at a

convenience store. Nor does respondent explain how Low could have convinced the jury to disregard respondent's discussion of drugs during a monitored telephone conversation, the incriminating items uncovered at respondent's residence, his client's mendacity to an officer, or the testimony of the other witnesses.

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For the foregoing reasons and those stated in our opening brief, the court of appeals' decision should be reversed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

APRIL 2006

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES *v.* GONZALEZ-LOPEZ

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 05–352. Argued April 18, 2006—Decided June 26, 2006

Respondent hired attorney Low to represent him on a federal drug charge. The District Court denied Low's application for admission *pro hac vice* on the ground that he had violated a professional conduct rule and then, with one exception, prevented respondent from meeting or consulting with Low throughout the trial. The jury found respondent guilty. Reversing, the Eighth Circuit held that the District Court erred in interpreting the disciplinary rule, that the court's refusal to admit Low therefore violated respondent's Sixth Amendment right to paid counsel of his choosing, and that this violation was not subject to harmless-error review.

Held: A trial court's erroneous deprivation of a criminal defendant's choice of counsel entitles him to reversal of his conviction. Pp. 3–12.

(a) In light of the Government's concession of erroneous deprivation, the trial court's error violated respondent's Sixth Amendment right to counsel of choice. The Court rejects the Government's contention that the violation is not "complete" unless the defendant can show that substitute counsel was ineffective within the meaning of *Strickland* v. *Washington*, 466 U. S. 668, 691–696—*i.e.*, that his performance was deficient and the defendant was prejudiced by it—or the defendant can demonstrate that substitute counsel's performance, while not deficient, was not as good as what his counsel of choice would have provided, creating a "reasonable probability that . . . the result . . . would have been different." *id.*, at 694. To support these propositions, the Government emphasizes that the right to counsel is accorded to ensure that the accused receive a fair trial. *Mickens* v. *Taylor*, 535 U. S. 162, 166, and asserts that a trial is not unfair unless a defendant has been prejudiced. The right to counsel

Syllabus

of choice, however, commands not that a trial be fair, but that a particular guarantee of fairness be provided—to wit, that the accused be defended by the counsel he believes to be best. Cf. *Crawford* v. *Washington*, 541 U. S. 36, 61. That right was violated here; no additional showing of prejudice is required to make the violation "complete." Pp. 3–7.

(b) The Sixth Amendment violation is not subject to harmless-error analysis. Erroneous deprivation of the right to counsel of choice, "with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error.'" *Sullivan* v. *Louisiana*, 508 U. S. 275, 282. It "def[ies] analysis by 'harmless error' standards" because it "affec[ts] the framework within which the trial proceeds" and is not "simply an error in the trial process itself." *Arizona* v. *Fulminante*, 499 U. S. 279, 309–310. Different attorneys will pursue different strategies with regard to myriad trial matters, and the choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides to go to trial. It is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings. This inquiry is not comparable to that required to show that a counsel's deficient performance prejudiced a defendant. Pp. 8–11.

(c) Nothing in the Court's opinion casts any doubt or places any qualification upon its previous holdings limiting the right to counsel of choice and recognizing trial courts' authority to establish criteria for admitting lawyers to argue before them. However broad a trial court's discretion may be, this Court accepts the Government's concession that the District Court erred. Pp. 11–12.

399 F. 3d 924, affirmed and remanded.

SCALIA, J., delivered the opinion of the Court, in which STEVENS, SOUTER, GINSBURG, and BREYER, JJ., joined. ALITO, J., filed a dissenting opinion, in which ROBERTS, C. J., and KENNEDY and THOMAS, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 05–352

UNITED STATES, PETITIONER *v.* CUAUHTEMOC GONZALEZ-LOPEZ

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[June 26, 2006]

JUSTICE SCALIA delivered the opinion of the Court.

We must decide whether a trial court's erroneous deprivation of a criminal defendant's choice of counsel entitles him to a reversal of his conviction.

I

Respondent Cuauhtemoc Gonzalez-Lopez was charged in the Eastern District of Missouri with conspiracy to distribute more than 100 kilograms of marijuana. His family hired attorney John Fahle to represent him. After the arraignment, respondent called a California attorney, Joseph Low, to discuss whether Low would represent him, either in addition to or instead of Fahle. Low flew from California to meet with respondent, who hired him.

Some time later, Low and Fahle represented respondent at an evidentiary hearing before a Magistrate Judge. The Magistrate Judge accepted Low's provisional entry of appearance and permitted Low to participate in the hearing on the condition that he immediately file a motion for admission *pro hac vice*. During the hearing, however, the Magistrate Judge revoked the provisional acceptance on the ground that, by passing notes to Fahle, Low had vio-

lated a court rule restricting the cross-examination of a witness to one counsel.

The following week, respondent informed Fahle that he wanted Low to be his only attorney. Low then filed an application for admission *pro hac vice*. The District Court denied his application without comment. A month later, Low filed a second application, which the District Court again denied without explanation. Low's appeal, in the form of an application for a writ of mandamus, was dismissed by the United States Court of Appeals for the Eighth Circuit.

Fahle filed a motion to withdraw as counsel and for a show-cause hearing to consider sanctions against Low. Fahle asserted that, by contacting respondent while respondent was represented by Fahle, Low violated Mo. Rule of Professional Conduct 4–4.2 (1993), which prohibits a lawyer "[i]n representing a client" from "communicat[ing] about the subject of the representation with a party . . . represented by another lawyer" without that lawyer's consent. Low filed a motion to strike Fahle's motion. The District Court granted Fahle's motion to withdraw and granted a continuance so that respondent could find new representation. Respondent retained a local attorney, Karl Dickhaus, for the trial. The District Court then denied Low's motion to strike and, for the first time, explained that it had denied Low's motions for admission *pro hac vice* primarily because, in a separate case before it, Low had violated Rule 4–4.2 by communicating with a represented party.

The case proceeded to trial, and Dickhaus represented respondent. Low again moved for admission and was again denied. The Court also denied Dickhaus's request to have Low at counsel table with him and ordered Low to sit in the audience and to have no contact with Dickhaus during the proceedings. To enforce the Court's order, a United States Marshal sat between Low and Dickhaus at

trial. Respondent was unable to meet with Low throughout the trial, except for once on the last night. The jury found respondent guilty.

After trial, the District Court granted Fahle's motion for sanctions against Low. It read Rule 4–4.2 to forbid Low's contact with respondent without Fahle's permission. It also reiterated that it had denied Low's motions for admission on the ground that Low had violated the same Rule in a separate matter.

Respondent appealed, and the Eighth Circuit vacated the conviction. 399 F. 3d 924 (2005). The Court first held that the District Court erred in interpreting Rule 4–4.2 to prohibit Low's conduct both in this case and in the separate matter on which the District Court based its denials of his admission motions. The District Court's denials of these motions were therefore erroneous and violated respondent's Sixth Amendment right to paid counsel of his choosing. See *id.*, at 928–932. The Court then concluded that this Sixth Amendment violation was not subject to harmless-error review. See *id.*, at 932–935. We granted certiorari. 546 U. S. ___ (2006).

II

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." We have previously held that an element of this right is the right of a defendant who does not require appointed counsel to choose who will represent him. See *Wheat* v. *United States*, 486 U. S. 153, 159 (1988). Cf. *Powell* v. *Alabama*, 287 U. S. 45, 53 (1932) ("It is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice"). The Government here agrees, as it has previously, that "the Sixth Amendment guarantees the defendant the right to be represented by an otherwise qualified attorney

whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds." *Caplin & Drysdale, Chartered* v. *United States*, 491 U. S. 617, 624–625 (1989). To be sure, the right to counsel of choice "is circumscribed in several important respects." *Wheat*, *supra*, at 159. But the Government does not dispute the Eighth Circuit's conclusion in this case that the District Court erroneously deprived respondent of his counsel of choice.

The Government contends, however, that the Sixth Amendment violation is not "complete" unless the defendant can show that substitute counsel was ineffective within the meaning of *Strickland* v. *Washington*, 466 U. S. 668, 691–696 (1984)—*i.e.*, that substitute counsel's performance was deficient and the defendant was prejudiced by it. In the alternative, the Government contends that the defendant must at least demonstrate that his counsel of choice would have pursued a different strategy that would have created a "reasonable probability that . . . the result of the proceedings would have been different," *id.*, at 694—in other words, that he was prejudiced within the meaning of *Strickland* by the denial of his counsel of choice even if substitute counsel's performance was not constitutionally deficient.[1] To support these propositions, the Government points to our prior cases, which note that the right to counsel "has been accorded . . . not for its own

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[1]The dissent proposes yet a third standard—viz., that the defendant must show " 'an identifiable difference in the quality of representation between the disqualified counsel and the attorney who represents the defendant at trial.' " *Post*, at 4 (opinion of ALITO, J.). That proposal suffers from the same infirmities (outlined later in text) that beset the Government's positions. In addition, however, it greatly impairs the clarity of the law. How is a lower-court judge to know what an "identifiable difference" consists of? Whereas the Government at least appeals to *Strickland* and the case law under it, the most the dissent can claim by way of precedential support for its rule is that it is "consistent with" cases that never discussed the issue of prejudice. *Id.*

sake, but for the effect it has on the ability of the accused to receive a fair trial." *Mickens* v. *Taylor*, 535 U. S. 162, 166 (2002) (internal quotation marks omitted). A trial is not unfair and thus the Sixth Amendment is not violated, the Government reasons, unless a defendant has been prejudiced.

Stated as broadly as this, the Government's argument in effect reads the Sixth Amendment as a more detailed version of the Due Process Clause—and then proceeds to give no effect to the details. It is true enough that the purpose of the rights set forth in that Amendment is to ensure a fair trial; but it does not follow that the rights can be disregarded so long as the trial is, on the whole, fair. What the Government urges upon us here is what was urged upon us (successfully, at one time, see *Ohio* v. *Roberts*, 448 U. S. 56 (1980)) with regard to the Sixth Amendment's right of confrontation—a line of reasoning that "abstracts from the right to its purposes, and then eliminates the right." *Maryland* v. *Craig*, 497 U. S. 836, 862 (1990) (SCALIA, J., dissenting). Since, it was argued, the purpose of the Confrontation Clause was to ensure the reliability of evidence, so long as the testimonial hearsay bore "indicia of reliability," the Confrontation Clause was not violated. See *Roberts*, *supra*, at 65–66. We rejected that argument (and our prior cases that had accepted it) in *Crawford* v. *Washington*, 541 U. S. 36 (2004), saying that the Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Id.*, at 61.

So also with the Sixth Amendment right to counsel of choice. It commands, not that a trial be fair, but that a particular guarantee of fairness be provided—to wit, that the accused be defended by the counsel he believes to be best. "The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements

of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause." *Strickland, supra,* at 684–685. In sum, the right at stake here is the right to counsel of choice, not the right to a fair trial; and that right was violated because the deprivation of counsel was erroneous. No additional showing of prejudice is required to make the violation "complete."[2]

The cases the Government relies on involve the right to the effective assistance of counsel, the violation of which generally requires a defendant to establish prejudice. See, *e.g., Strickland, supra,* at 694; *Mickens, supra,* at 166; *United States* v. *Cronic,* 466 U. S. 648 (1984). The earliest case generally cited for the proposition that "the right to counsel is the right to the effective assistance of counsel," *McMann* v. *Richardson,* 397 U. S. 759, 771, n. 14 (1970), was based on the Due Process Clause rather than on the Sixth Amendment, see *Powell,* 287 U. S., at 57 (cited in *e.g., McMann, supra,* at 771, n. 14). And even our recognition of the right to effective counsel within the Sixth Amendment was a consequence of our perception that representation by counsel "is critical to the ability of the adversarial system to produce just results." *Strickland, supra,* at 685. Having derived the right to effective representation from the purpose of ensuring a fair trial, we have, logically enough, also derived the limits of that right from that same purpose. See *Mickens, supra,* at 166. The

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[2]The dissent resists giving effect to our cases' recognition, and the Government's concession, that a defendant has a right to be defended by counsel of his choosing. It argues that because the Sixth Amendment guarantees the right to the "assistance of counsel," it is not violated unless "the erroneous disqualification of a defendant's counsel of choice . . . impair[s] the assistance that a defendant receives at trial." *Post,* at 1–2 (opinion of ALITO, J.). But if our cases (and the Government's concession) mean anything, it is that the Sixth Amendment is violated when the erroneous disqualification of counsel "impair[s] the assistance that a defendant receives at trial *[from the counsel that he chose]."*

requirement that a defendant show prejudice in effective representation cases arises from the very nature of the specific element of the right to counsel at issue there—*effective* (not mistake-free) representation. Counsel cannot be "ineffective" unless his mistakes have harmed the defense (or, at least, unless it is reasonably likely that they have). Thus, a violation of the Sixth Amendment right to *effective* representation is not "complete" until the defendant is prejudiced. See *Strickland*, *supra*, at 685.

The right to select counsel of one's choice, by contrast, has never been derived from the Sixth Amendment's purpose of ensuring a fair trial.[3] It has been regarded as the root meaning of the constitutional guarantee. See *Wheat*, 486 U. S., at 159; *Andersen* v. *Treat*, 172 U. S. 24 (1898). See generally W. Beaney, The Right to Counsel in American Courts 18–24, 27–33 (1955). Cf. *Powell*, *supra*, at 53. Where the right to be assisted by counsel of one's choice is wrongly denied, therefore, it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation. Deprivation of the right is "complete" when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received. To argue otherwise is to confuse the right to counsel of choice—which is the right to a particular lawyer regardless of comparative effectiveness—with the right to effective counsel—which imposes a baseline requirement of competence on whatever lawyer is chosen or appointed.

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[3]In *Wheat* v. *United States*, 486 U. S. 153 (1988), where we formulated the right to counsel of choice and discussed some of the limitations upon it, we took note of the overarching purpose of fair trial in holding that the trial court has discretion to disallow a first choice of counsel that would create serious risk of conflict of interest. *Id.*, at 159. It is one thing to conclude that the right to counsel of choice may be limited by the need for fair trial, but quite another to say that the right does not exist unless its denial renders the trial unfair.

III

Having concluded, in light of the Government's concession of erroneous deprivation, that the trial court violated respondent's Sixth Amendment right to counsel of choice, we must consider whether this error is subject to review for harmlessness. In *Arizona* v. *Fulminante*, 499 U. S. 279 (1991), we divided constitutional errors into two classes. The first we called "trial error," because the errors "occurred during presentation of the case to the jury" and their effect may "be quantitatively assessed in the context of other evidence presented in order to determine whether [they were] harmless beyond a reasonable doubt." *Id.*, at 307–308 (internal quotation marks omitted). These include "most constitutional errors." *Id.*, at 306. The second class of constitutional error we called "structural defects." These "defy analysis by 'harmless-error' standards" because they "affec[t] the framework within which the trial proceeds," and are not "simply an error in the trial process itself." *Id.*, at 309–310.[4] See also *Neder* v. *United States*,

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[4]The dissent criticizes us for our trial error/structural defect dichotomy, asserting that *Fulminante* never said that "trial errors are the *only* sorts of errors amenable to harmless-error review, or that *all* errors affecting the framework within which the trial proceeds are structural," *post*, at 8 (opinion of ALITO, J.) (internal quotation marks and citation omitted). Although it is hard to read that case as doing anything other than dividing constitutional error into two comprehensive categories, our ensuing analysis in fact relies neither upon such comprehensiveness nor upon trial error as the touchstone for the availability of harmless-error review. Rather, here, as we have done in the past, we rest our conclusion of structural error upon the difficulty of assessing the effect of the error. See *Waller* v. *Georgia*, 467 U. S. 39, 49, n. 9 (1984) (violation of the public-trial guarantee is not subject to harmlessness review because "the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance"); *Vasquez* v. *Hillery*, 474 U. S. 254, 263 (1986) ("[W]hen a petit jury has been selected upon improper criteria or has been exposed to prejudicial publicity, we

527 U. S. 1, 7–9 (1999). Such errors include the denial of counsel, see *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), the denial of the right of self-representation, see *McKaskle* v. *Wiggins*, 465 U. S. 168, 177–178, n. 8 (1984), the denial of the right to public trial, see *Waller* v. *Georgia*, 467 U. S. 39, 49, n. 9 (1984), and the denial of the right to trial by jury by the giving of a defective reasonable-doubt instruction, see *Sullivan* v. *Louisiana*, 508 U. S. 275 (1993).

We have little trouble concluding that erroneous deprivation of the right to counsel of choice, "with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error.'" *Id.*, at 282. Different attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument. And the choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial. In light of these myriad aspects of representation, the erroneous denial of counsel bears directly on the "framework within which the trial proceeds," *Fulminante*, *supra*,

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have required reversal of the conviction because the effect of the violation cannot be ascertained"). The dissent would use "fundamental unfairness" as the sole criterion of structural error, and cites a case in which that was the determining factor, see *Neder* v. *United States*, 527 U. S. 1, 9 (1999) (quoted by the dissent, *post*, at 6). But this has not been the only criterion we have used. In addition to the above cases using difficulty of assessment as the test, we have also relied on the irrelevance of harmlessness, see *McKaskle* v. *Wiggins*, 465 U. S. 168, 177, n. 8 (1984) ("Since the right to self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to 'harmless error' analysis"). Thus, it is the dissent that creates a single, inflexible criterion, inconsistent with the reasoning of our precedents, when it asserts that *only* those errors that *always* or *necessarily* render a trial fundamentally unfair and unreliable are structural, *post*, at 8.

at 310—or indeed on whether it proceeds at all. It is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings. Many counseled decisions, including those involving plea bargains and cooperation with the government, do not even concern the conduct of the trial at all. Harmless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe.

The Government acknowledges that the deprivation of choice of counsel pervades the entire trial, but points out that counsel's ineffectiveness may also do so and yet we do not allow reversal of a conviction for that reason without a showing of prejudice. But the requirement of showing prejudice in ineffectiveness claims stems from the very definition of the right at issue; it is not a matter of showing that the violation was harmless, but of showing that a violation of the right to effective representation *occurred*. A choice-of-counsel violation occurs *whenever* the defendant's choice is wrongfully denied. Moreover, if and when counsel's ineffectiveness "pervades" a trial, it does so (to the extent we can detect it) through identifiable mistakes. We can assess how those mistakes affected the outcome. To determine the effect of wrongful denial of choice of counsel, however, we would not be looking for mistakes committed by the actual counsel, but for differences in the defense that would have been made by the rejected counsel—in matters ranging from questions asked on *voir dire* and cross-examination to such intangibles as argument style and relationship with the prosecutors. We would have to speculate upon what matters the rejected counsel would have handled differently—or indeed, would have handled the same but with the benefit of a more jury-pleasing courtroom style or a longstanding relationship of trust with the prosecutors. And then we would have to

speculate upon what effect those different choices or different intangibles might have had. The difficulties of conducting the two assessments of prejudice are not remotely comparable.[5]

IV

Nothing we have said today casts any doubt or places any qualification upon our previous holdings that limit the right to counsel of choice and recognize the authority of trial courts to establish criteria for admitting lawyers to argue before them. As the dissent too discusses, *post,* at 3, the right to counsel of choice does not extend to defendants who require counsel to be appointed for them. See *Wheat,* 486 U. S., at 159; *Caplin & Drysdale,* 491 U. S., at 624, 626. Nor may a defendant insist on representation by a person who is not a member of the bar, or demand that a court honor his waiver of conflict-free representation. See *Wheat,* 486 U. S., at 159–160. We have recognized a trial court's wide latitude in balancing the right to counsel of choice against the needs of fairness, *id.,* at 163–164, and against the demands of its calendar, *Morris* v. *Slappy,* 461 U. S. 1, 11–12 (1983). The court has, moreover, an "independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and

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[5] In its discussion of the analysis that would be required to conduct harmless-error review, the dissent focuses on which counsel was "better." See *post,* at 7–8 (opinion of ALITO, J.). This focus has the effect of making the analysis look achievable, but it is fundamentally inconsistent with the principle (which the dissent purports to accept for the sake of argument) that the Sixth Amendment can be violated without a showing of harm to the quality of representation. Cf. *McKaskle, supra,* at 177, n. 8. By framing its inquiry in these terms and expressing indignation at the thought that a defendant may receive a new trial when his actual counsel was at least as effective as the one he wanted, the dissent betrays its misunderstanding of the nature of the right to counsel of choice and its confusion of this right with the right to effective assistance of counsel.

that legal proceedings appear fair to all who observe them." *Wheat, supra,* at 160. None of these limitations on the right to choose one's counsel is relevant here. This is not a case about a court's power to enforce rules or adhere to practices that determine which attorneys may appear before it, or to make scheduling and other decisions that effectively exclude a defendant's first choice of counsel. However broad a court's discretion may be, the Government has conceded that the District Court here erred when it denied respondent his choice of counsel. Accepting that premise, we hold that the error violated respondent's Sixth Amendment right to counsel of choice and that this violation is not subject to harmless-error analysis.

* * *

The judgment of the Court of Appeals is affirmed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 05–352

UNITED STATES, PETITIONER *v.* CUAUHTEMOC GONZALEZ-LOPEZ

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[June 26, 2006]

JUSTICE ALITO, with whom THE CHIEF JUSTICE, JUSTICE KENNEDY, and JUSTICE THOMAS join, dissenting.

I disagree with the Court's conclusion that a criminal conviction must automatically be reversed whenever a trial court errs in applying its rules regarding *pro hac vice* admissions and as a result prevents a defendant from being represented at trial by the defendant's first-choice attorney. Instead, a defendant should be required to make at least *some* showing that the trial court's erroneous ruling adversely affected the quality of assistance that the defendant received. In my view, the majority's contrary holding is based on an incorrect interpretation of the Sixth Amendment and a misapplication of harmless-error principles. I respectfully dissent.

I

The majority makes a subtle but important mistake at the outset in its characterization of what the Sixth Amendment guarantees. The majority states that the Sixth Amendment protects "the right of a defendant who does not require appointed counsel to choose who will represent him." *Ante*, at 3. What the Sixth Amendment actually protects, however, is the right to have *the assistance* that the defendant's counsel of choice is able to provide. It follows that if the erroneous disqualification of

a defendant's counsel of choice does not impair the assistance that a defendant receives at trial, there is no violation of the Sixth Amendment.[1]

The language of the Sixth Amendment supports this interpretation. The Assistance of Counsel Clause focuses on what a defendant is entitled to receive ("Assistance"), rather than on the identity of the provider. The background of the adoption of the Sixth Amendment points in the same direction. The specific evil against which the Assistance of Counsel Clause was aimed was the English common-law rule severely limiting a felony defendant's ability to be assisted by counsel. *United States* v. *Ash*, 413 U. S. 300, 306 (1973). "[T]he core purpose of the counsel guarantee was to assure 'Assistance' at trial," *id.*, at 309, and thereby "to assure fairness in the adversary criminal process," *United States* v. *Morrison*, 449 U. S. 361, 364 (1981). It was not "the essential aim of the Amendment . . . to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." *Wheat* v. *United States*, 486 U. S. 153, 159 (1988); cf. *Morris* v. *Slappy*, 461 U. S. 1, 14 (1983) ("[W]e reject the claim that the Sixth Amendment guarantees a 'meaningful relationship' between an accused and his counsel").

There is no doubt, of course, that the right "to have the Assistance of Counsel" carries with it a limited right to be represented by counsel of choice. At the time of the adoption of the Bill of Rights, when the availability of appointed counsel was generally limited,[2] that is how the

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[1] This view is consistent with the Government's concession that "[t]he Sixth Amendment . . . encompasses a non-indigent defendant's right to select counsel who will represent him in a criminal prosecution." Brief for United States 11, though this right is "circumscribed in several important respects," *id.*, at 12 (citation and internal quotation marks omitted).

[2] See Act of Apr. 30, 1790, ch. 9, §29, 1 Stat. 118 (providing for appointment of counsel in capital cases); *Betts* v. *Brady*, 316 U. S. 455,

right inevitably played out: A defendant's right to have the assistance of counsel necessarily meant the right to have the assistance of whatever counsel the defendant was able to secure. But from the beginning, the right to counsel of choice has been circumscribed.

For one thing, a defendant's choice of counsel has always been restricted by the rules governing admission to practice before the court in question. The Judiciary Act of 1789 made this clear, providing that parties "in all the courts of the United States" had the right to "the assistance of such counsel or attorneys at law as by the rules of the said courts respectively shall be permitted to manage and conduct cases therein." Ch. 20, §35, 1 Stat. 92. Therefore, if a defendant's first-choice attorney was not eligible to appear under the rules of a particular court, the defendant had no right to be represented by that attorney. Indeed, if a defendant's top 10 or top 25 choices were all attorneys who were not eligible to appear in the court in question, the defendant had no right to be represented by any of them. Today, rules governing admission to practice before particular courts continue to limit the ability of a criminal defendant to be represented by counsel of choice. See *Wheat*, 486 U. S., at 159.

The right to counsel of choice is also limited by conflict-of-interest rules. Even if a defendant is aware that his or her attorney of choice has a conflict, and even if the defendant is eager to waive any objection, the defendant has no constitutional right to be represented by that attorney. See *id.*, at 159–160.

Similarly, the right to be represented by counsel of choice can be limited by mundane case-management considerations. If a trial judge schedules a trial to begin on a particular date and defendant's counsel of choice is already committed for other trials until some time thereaf-

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467, n. 20 (1942) (surveying state statutes).

ter, the trial judge has discretion under appropriate circumstances to refuse to postpone the trial date and thereby, in effect, to force the defendant to forgo counsel of choice. See, *e.g.*, *Slappy*, *supra*; *United States* v. *Hughey*, 147 F. 3d 423, 428–431 (CA5 1998).

These limitations on the right to counsel of choice are tolerable because the focus of the right is the quality of the representation that the defendant receives, not the identity of the attorney who provides the representation. Limiting a defendant to those attorneys who are willing, available, and eligible to represent the defendant still leaves a defendant with a pool of attorneys to choose from—and, in most jurisdictions today, a large and diverse pool. Thus, these restrictions generally have no adverse effect on a defendant's ability to secure the best assistance that the defendant's circumstances permit.

Because the Sixth Amendment focuses on the quality of the assistance that counsel of choice would have provided, I would hold that the erroneous disqualification of counsel does not violate the Sixth Amendment unless the ruling diminishes the quality of assistance that the defendant would have otherwise received. This would not require a defendant to show that the second-choice attorney was constitutionally ineffective within the meaning of *Strickland* v. *Washington*, 466 U. S. 668 (1984). Rather, the defendant would be entitled to a new trial if the defendant could show "an identifiable difference in the quality of representation between the disqualified counsel and the attorney who represents the defendant at trial." *Rodriguez* v. *Chandler*, 382 F. 3d 670, 675 (CA7 2004), cert. denied, 543 U. S. 1156 (2005).

This approach is fully consistent with our prior decisions. We have never held that the erroneous disqualification of counsel violates the Sixth Amendment when there is no prejudice, and while we have stated in several cases that the Sixth Amendment protects a defendant's right to

counsel of choice, see *Caplin & Drysdale, Chartered* v. *United States*, 491 U. S. 617, 624–625 (1989); *Wheat*, *supra*, at 159; *Powell* v. *Alabama*, 287 U. S. 45, 53 (1932), we had no occasion in those cases to consider whether a violation of this right can be shown where there is no prejudice. Nor do our opinions in those cases refer to that question. It is therefore unreasonable to read our general statements regarding counsel of choice as addressing the issue of prejudice.[3]

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[3] *Powell* is the case generally cited as first noting a defendant's right to counsel of choice. *Powell* involved an infamous trial in which the defendants were prevented from obtaining any counsel of their choice and were instead constrained to proceed with court-appointed counsel of dubious effectiveness. We held that this denied them due process and that "a fair opportunity to secure counsel of [one's] own choice" is a necessary concomitant of the right to counsel. 287 U. S., at 53; cf. *id.*, at 71 ("[T]he failure of the trial court to give [petitioners] reasonable time and opportunity to secure counsel was a clear denial of due process"). It is clear from the facts of the case that we were referring to the denial of the opportunity to choose *any* counsel, and we certainly said nothing to suggest that a violation of the right to counsel of choice could be established without any showing of prejudice.

In *Wheat*, we held that the trial judge had not erred in declining the defendant's waiver of his right to conflict-free counsel, and therefore we had no need to consider whether an incorrect ruling would have required reversal of the defendant's conviction in the absence of a showing of prejudice. We noted that "the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment." 486 U. S., at 159, but we went on to stress that this right "is circumscribed in several important respects," *ibid.*, including by the requirement of bar membership and rules against conflicts of interest. *Wheat* did not suggest that a violation of the limited Sixth Amendment right to counsel of choice can be established without showing prejudice, and our statements about the Sixth Amendment's "purpose" and "essential aim"—providing effective advocacy and a fair trial, *ibid.*—suggest the opposite.

Finally, in *Caplin & Drysdale*, we held that the challenged action of the trial judge—entering an order forfeiting funds that the defendant had earmarked for use in paying his attorneys—had been proper, and, accordingly, we had no occasion to address the issue of prejudice. We recognized that "the Sixth Amendment guarantees a defendant the

II

But even accepting, as the majority holds, that the erroneous disqualification of counsel of choice always violates the Sixth Amendment, it still would not follow that reversal is required in all cases. The Constitution, by its terms, does not mandate any particular remedy for violations of its own provisions. Instead, we are bound in this case by Federal Rule of Criminal Procedure 52(a), which instructs federal courts to "disregar[d]" "[a]ny error . . . which does not affect substantial rights." See also 28 U. S. C. §2111; *Chapman* v. *California*, 386 U. S. 18, 22 (1967). The only exceptions we have recognized to this rule have been for "a limited class of fundamental constitutional errors that 'defy analysis by "harmless error" standards.'" *Neder* v. *United States*, 527 U. S. 1, 7 (1999) (quoting *Arizona* v. *Fulminante*, 499 U. S. 279, 309 (1991)); see also *Chapman*, *supra*, at 23. "Such errors . . . 'necessarily render a trial fundamentally unfair' [and] deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair.'" *Neder*, *supra*, at 8–9 (quoting *Rose* v. *Clark*, 478 U. S. 570, 577–578 (1986) (second omission in original)); see also *ante*, at 9 (listing such errors).

Thus, in *Neder*, we rejected the argument that the omission of an element of a crime in a jury instruction "*necessarily* render[s] a criminal trial fundamentally unfair or

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right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds." 491 U. S., at 624–625, but we added that "[w]hatever the full extent of the Sixth Amendment's protection of one's right to retain counsel of his choosing, that protection does not go beyond 'the individual's right to spend his own money to obtain the advice and assistance of . . . counsel.'" *id.*, at 626 (omission in original).

an unreliable vehicle for determining guilt or innocence." 527 U. S., at 9. In fact, in that case, "quite the opposite [was] true: Neder was tried before an impartial judge, under the correct standard of proof and with the assistance of counsel; a fairly selected, impartial jury was instructed to consider all of the evidence and argument in respect to Neder's defense . . . ." *Ibid.*

Neder's situation—with an impartial judge, the correct standard of proof, assistance of counsel, and a fair jury—is much like respondent's. Fundamental unfairness does not inexorably follow from the denial of first-choice counsel. The "decision to retain a particular lawyer" is "often uninformed," *Cuyler* v. *Sullivan*, 446 U. S. 335, 344 (1980); a defendant's second-choice lawyer may thus turn out to be better than the defendant's first-choice lawyer. More often, a defendant's first- and second-choice lawyers may be simply indistinguishable. These possibilities would not justify violating the right to choice of counsel, but they do make me hard put to characterize the violation as "*always* render[ing] a trial unfair," *Neder*, *supra*, at 9. Fairness may not limit the right, see *ante*, at 5, but it does inform the remedy.

Nor is it always or nearly always impossible to determine whether the first choice would have provided better representation than the second choice. There are undoubtedly cases in which the prosecution would have little difficulty showing that the second-choice attorney was better qualified than or at least as qualified as the defendant's initial choice, and there are other cases in which it will be evident to the trial judge that any difference in ability or strategy could not have possibly affected the outcome of the trial.

Requiring a defendant to fall back on a second-choice attorney is not comparable to denying a defendant the right to be represented by counsel at all. Refusing to permit a defendant to receive the assistance of any counsel

is the epitome of fundamental unfairness, and as far as the effect on the outcome is concerned, it is much more difficult to assess the effect of a complete denial of counsel than it is to assess the effect of merely preventing representation by the defendant's first-choice attorney. To be sure, when the effect of an erroneous disqualification is hard to gauge, the prosecution will be unable to meet its burden of showing that the error was harmless beyond a reasonable doubt. But that does not justify eliminating the possibility of showing harmless error in all cases.

The majority's focus on the "trial error"/"structural defect" dichotomy is misleading. In *Fulminante*, we used these terms to denote two poles of constitutional error that had appeared in prior cases; trial errors always lead to harmless-error review, while structural defects always lead to automatic reversal. See 499 U. S., at 306–310. We did not suggest that trial errors are the *only* sorts of errors amenable to harmless-error review, or that *all* errors "affecting the framework within which the trial proceeds," *id.*, at 310, are structural. The touchstone of structural error is fundamental unfairness and unreliability. Automatic reversal is strong medicine that should be reserved for constitutional errors that "*always*" or "*necessarily*," *Neder*, *supra*, at 9 (emphasis in original), produce such unfairness.

III

Either of the two courses outlined above—requiring at least some showing of prejudice, or engaging in harmless-error review—would avoid the anomalous and unjustifiable consequences that follow from the majority's two-part rule of error without prejudice followed by automatic reversal.

Under the majority's holding, a defendant who is erroneously required to go to trial with a second-choice attorney is automatically entitled to a new trial even if this

attorney performed brilliantly. By contrast, a defendant whose attorney was ineffective in the constitutional sense (*i.e.*, "made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment," *Strickland*, 466 U. S., at 687) cannot obtain relief without showing prejudice.

Under the majority's holding, a trial court may adopt rules severely restricting *pro hac vice* admissions, cf. *Leis* v. *Flynt*, 439 U. S. 438, 443 (1979) *(per curiam)*, but if it adopts a generous rule and then errs in interpreting or applying it, the error automatically requires reversal of any conviction, regardless of whether the erroneous ruling had any effect on the defendant.

Under the majority's holding, some defendants will be awarded new trials even though it is clear that the erroneous disqualification of their first-choice counsel did not prejudice them in the least. Suppose, for example, that a defendant is initially represented by an attorney who previously represented the defendant in civil matters and who has little criminal experience. Suppose that this attorney is erroneously disqualified and that the defendant is then able to secure the services of a nationally acclaimed and highly experienced criminal defense attorney who secures a surprisingly favorable result at trial—for instance, acquittal on most but not all counts. Under the majority's holding, the trial court's erroneous ruling automatically means that the Sixth Amendment was violated—even if the defendant makes no attempt to argue that the disqualified attorney would have done a better job. In fact, the defendant would still be entitled to a new trial on the counts of conviction even if the defendant publicly proclaimed after the verdict that the second attorney had provided better representation than any other attorney in the country could have possibly done.

Cases as stark as the above hypothetical are unlikely, but there are certainly cases in which the erroneous dis-

qualification of a defendant's first-choice counsel neither seriously upsets the defendant's preferences nor impairs the defendant's representation at trial. As noted above, a defendant's second-choice lawyer may sometimes be better than the defendant's first-choice lawyer. Defendants who retain counsel are frequently forced to choose among attorneys whom they do not know and about whom they have limited information, and thus a defendant may not have a strong preference for any one of the candidates. In addition, if all of the attorneys considered charge roughly comparable fees, they may also be roughly comparable in experience and ability. Under these circumstances, the erroneous disqualification of a defendant's first-choice attorney may simply mean that the defendant will be represented by an attorney whom the defendant very nearly chose initially and who is able to provide representation that is just as good as that which would have been furnished by the disqualified attorney. In light of these realities, mandating reversal without even a minimal showing of prejudice on the part of the defendant is unwarranted.

The consequences of the majority's holding are particularly severe in the federal system and in other court systems that do not allow a defendant to take an interlocutory appeal when counsel is disqualified. See *Flanagan* v. *United States*, 465 U. S. 259, 260 (1984). Under such systems, appellate review typically occurs after the defendant has been tried and convicted. At that point, if an appellate court concludes that the trial judge made a marginally incorrect ruling in applying its own *pro hac vice* rules, the appellate court has no alternative but to order a new trial—even if there is not even any claim of prejudice. The Sixth Amendment does not require such results.

Because I believe that some showing of prejudice is required to establish a violation of the Sixth Amendment,

I would vacate and remand to let the Court of Appeals determine whether there was prejudice. However, assuming for the sake of argument that no prejudice is required, I believe that such a violation, like most constitutional violations, is amenable to harmless-error review. Our statutes demand it, and our precedents do not bar it. I would then vacate and remand to let the Court of Appeals determine whether the error was harmless in this case.